Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

211 I.A. 1

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Audrey Austin, a Minor etc.,
Appellee

vs.

No. 29
October Term, 1917.

Nell Bass et al,
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. W. O. POTTER

Term No. 29. Agenda No.29.

October Term, 1917.

Audrey Austin, a Minor, by her next friend, Lora Austin, Appellee	
v.	Appeal from Williamson.
Nell Bass and James C. Harris, Appellants	

Opinion by Higbee, J.

---oOo---

This is an action in case brought by appellee, Audrey Austin, by her next friend, Lora Austin against Nell Bass and James C. Harris, appellants, under section nine of the Dramshop Act of this state. The declaration originally consisted of five counts but at the close of appellee's evidence the court directed the jury to find appellants not guilty as to all counts except the second and third. The second count alleges in substance that on and prior to the twenty fourth day of June, 1916, Nell Bass, occupied a certain house located in Johnston City, Illinois, which she leased from the owner said James C. Harris; that she conducted therein a dramshop where intoxicating liquors in less quantities than one gallon were being sold and that the landlord Harris had knowledge of such fact; that on said date in said premises said Nell Bass, sold and gave to Robert Austin, the father of appellee, intoxicating liquors which he drank and which contributed in whole or in part to the intoxication of the said Robert Austin; that the said Nell Bass then and there drank intoxicating liquors with the said

Term No. 29. Jaunda No.29.

October [illegible], 1917.

Audrey Smith, [illegible]
next friend, Jose Jonsin,

Petitioner

v.

Hall Jane and James [illegible] Williamson,

Respondents

Petition by [illegible].

---o0o---

This is an [illegible] in a [illegible] proceeding, Audrey Smith, by [illegible], her [illegible] next friend Jose and James [illegible] of the Superior Court of [illegible] originally commenced [illegible] evidence the [illegible] not [illegible] the second [illegible] the twenty fourth [illegible] certain [illegible] Hence it [illegible] hinted [illegible] [illegible] land [illegible] said [illegible] life. [illegible] Jose and which [illegible] termination of the [illegible] Jose then and [illegible] the said

Robert Austin, becoming thereby herself intoxicated and by means of the intoxication of the said Robert Austin and the said Nell Bass, she, the said Nell Bass, shot and instantly killed said Robert Austin; that the said Robert Austin prior to his death earned the sum of $1500 yearly; that he provided for himself and appellee and that by reason of his death she had been injured in her means of support to her damage in the amount of $10,000. The third count is in effect the same as the second. Appellant filed a plea of the general issue and on a trial before a jury a verdict for $1750 was returned in favor of appellee and judgment entered thereon.

Appellee has not filed any brief and the judgment could have been reversed and remanded pro forma but we have carefully examined the record and find this case arises from the same state of facts as those stated in the case of Lora Austin v. Nell Bass and James C. Harris, in which this court filed an opinion reversing and remanding, on June 18, 1917, the said Lora Austin the plaintiff in that case being the mother of appellee Audrey Austin and the widow of said Robert Austin, deceased. The facts as they appear from the record in this case are fully stated in that opinion and no good purpose could be subserved by repeating them here.

This court held in the former case that the sale, or any sale, made by Nell Bass to Austin could not be regarded as creating a liability where the act complained of was caused by the intoxication of Nell Bass and as the facts in this case are the same as in the former one, that holding must prevail here. It is urged that the court committed error in refusing to give certain of appellant's

Robert Austin, becoming thereby accidentally intoxicated and by means of the intoxication of the said Robert Austin and the said Nell Ware, the said [illegible], wrongfully and intentionally killed said Robert Austin; that the said Robert Austin prior to his death [illegible] [illegible] [illegible] that he provided for himself and [illegible] that by reason of his death he had been injured in [illegible] support to her damage in the amount of [illegible] [illegible] court is in effect the same as the [illegible]. [illegible] filed a plea of the general issue and [illegible] a jury a verdict for [illegible] was returned [illegible] and judgment entered thereon.

Appellee has not [illegible] any [illegible] judgment could have been reversed [illegible] carefully examined the record [illegible] the same state of facts [illegible] Austin v. Nell Ware [illegible] filed an opinion reversing [illegible] the said Robert Austin, [illegible] the mother of appellee [illegible] Robert Austin, [illegible] the record in [illegible] and no good purpose could be [illegible] this [illegible].

This court [illegible] or any [illegible] [illegible] was caused by the [illegible] facts in this case are the [illegible] holding must reverse here. [illegible] court committed error in [illegible] [illegible]

instructions numbered one, two and three. These instructions one and three are almost identical in the language used with refused instruction number eight on the former trial, the refusal to give which was in that case held by this court to have been an error, and refused instruction two was in substance the same. Instruction No. 2 given in behalf of appellee in substance advised the jury that every child or other person who has been injured in person or property or means of support by any intoxicated person or in consequence of the intoxication of any person has a right of action against any person who has by selling or giving intoxicating liquors to such person, caused such intoxication in whole or in part, and that any person who was the owner of the building and knowingly permitted the sale of intoxicating liquors therein causing in whole or in part the intoxication of such person, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors as aforesaid, "for all damages sustained as a result of such selling or giving away of intoxicating liquors as aforesaid and for exemplary damages". It is a well settled doctrine in this state, as stated by this court in the opinion above referred to, that it must be shown in order to recover exemplary damages, the sale was made under aggravating circumstances on part of the parties selling or was wantonly or wilfully done. This instruction informed the jury that exemplary damages could be recovered by one injured in person, property or means of support, by proving the mere sale of intoxicating liquors to a person who becomes intoxicated if in consequence thereof the person suing was injured in his or her means of support, but does not advise the jury

instructions numbered one, two and three. These instructions one and three are almost identical in the language used with refused instruction number eight on the former trial, the refusal to give which was in that case held by this court to have been an error, and refused instruction two was in substance the same. Instruction No. 2 given in behalf of appellee in substance advised the jury that every child or other person who has been injured in person or property or means of support by any intoxicated person or in consequence of the intoxication of any person has a right of action against any person who has by selling or giving intoxicating liquors to such person, caused such intoxication in whole or in part, and that any person who is the owner of the building and knowingly permitted the sale of intoxicating liquors therein causing in whole or in part the intoxication of such person, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors as aforesaid, for all damages sustained as a result of such selling or giving away of intoxicating liquors as aforesaid and for exemplary damages. [illegible] stated doctrine in this state, [illegible] this court in the construction where [illegible] refused to, that [illegible] recover exemplary damages, the [illegible] vating circumstances [illegible] wantonly or willfully done. [illegible] jury the [illegible] an person, property [illegible] sale or intoxication [illegible] cated it in consequence thereof the person [illegible] in his or her means of support, but does not define [illegible]

under what circumstances exemplary damages may be found and ignores the requirement that the proof must show the sale was made under aggravating circumstances on the part of the seller, or was wantonly or wilfully done.

In the opinion of this court above referred to we held it to be the well settled law of this state that it must be shown the sale was made under aggravating circumstances on the part of the seller or was wantonly or wilfully done, (citing Kellerman v. Arnold, 71 Ill.632). By that rule the instruction in question was plainly subject to criticism and should not have been given in the form in which it was presented. This case is so similar in every way and so interwoven with the case of Lora Austin against the same parties, supra that the opinion in that case must control the decision of this case. In that case the judgment of the trial court was reversed and the cause remanded and such must be the holding here.

Reversed and remanded.

Not to be reported in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th *day of* April *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOINI

4070

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

211 I.A. 13

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Charles Pauly, et al,
Appellees

vs.

No. 32
October Term, 1917.

County of Madison,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 32. Agenda No.26.

October Term, 1917.

Charles Pauly and Edward C. Pauly, Partners, Etc., Appellees	)	
v.	)	Appeal from Madison.
County of Madison, Appellant	)	

Opinion by Higbee, J.

---oOo---

Appellees, who are the members of a firm of architects, brought this suit to recover compensation claimed to be due them for services rendered the county of Madison in the preparation of plans and specifications for a court house.

The case has been tried twice in the circuit court without a jury. The first trial resulted in a judgment against appellees, but on appeal to this court, that judgment was reversed and the cause remanded for a new trial in an opinion filed April 17, 1916 (reported as abstracted 199 Ill. App.225). Upon the second trial there was a judgment in favor of appellees for $5062.50 from which the county has taken an appeal to this court. The facts are so fully stated in the former opinion filed by this court that it is unnecessary to repeat them here, especially as a careful examination of the record shows the facts in proof on this trial are substantially the same as in the first trial. The former opinion appears to have disposed of all the questions now raised by appellant.

It is urged however by appellant on this appeal that there could be no recovery on the part of appellees for the reason that the board of supervisors originally contemplated only the remodeling of a court house then in existence, that the first report of its building committee had that in view and that appellees were employed for the purpose of making plans and specifications to carry out this purpose, but that the plans and specifications prepared by appellees contemplated substantially a new structure at a cost largely in excess of that originally intended to be incurred. This question was fully discussed and passed upon in our former opinion, where it is said in concluding the review of the same, and referring to a resolution of the county board, "under this evidence it cannot be reasonably contended that appellants were in fault in submitting plans and specifications for a new building when they did so under the express direction of the committee, and where it further appeared that the committee acted in harmony with the will of the county board as expressed by the adoption of the resolution above mentioned." It is now further contended by appellants here that the plans and specifications prepared by appellee and submitted to the board of supervisors were not complete. This question also appears to have been fully disposed of in our former opinion in the following language: "The evidence discloses that complete plans and specifications were delivered to the building committee about the first of August, 1910 and presented to the county board at its regular meeting in that month, since which time such plans and specifications have remained in the possession of the county board. Our attention has not been called to any

objection, fault, criticism or other complaint then or at any time thereafter made to either the plans or specifications or to any disclaimer or denial of the right and authority of the committed to procure them." Even if this question had not been formerly disposed of the objection could not avail appellant here under the proof as it appears in this record. One architect produced as a witness by appellant, testified that they were incomplete, while another testified on behalf of appellees that they were as complete as it is customary to make such plans and specifications. The trial judge who heard these witnesses testify, had a better opportunity of judging of their credibility than this court and no sufficient reason appears why we should not concur in his finding upon that question.

It is another contention of appellant that appellees having declared upon a special contract in one count of the declaration, must recover upon the contract declared on or not at all and that they could not be permitted to recover under the common counts. In our former opinion it was said as could also be rightfully said here, "The evidence tends to show that appellants (now appellees) did everything they could in the performance of their contract and that full performance was prevented by the action of the county board." The doctrine is well established in this state that where an employer fails to perform his part of the contract for services, the employe is at liberty to acquiesce in an abandonment of the contract and may recover for services rendered under the common counts. Anglo-Wyoming Oil Fields v. Miller, 117 Ill.App.552; Ness Co. v. Dawson, 149 Ill.138; and this

same doctrine is applied against a municipality in the case of City of Elgin v. Joslyn, 136 Ill.5[illegible]5, in which the doctrine is laid down that "where a party performs his contract in part and is prevented by the other party from finishing it he will have the legal right to abandon it or treat it as rescinded and sue and recover for the work and materials furnished by him". In accordance with the holdings of this court when this case was here on the former trial, the judgment of the court below should and will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* April *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

241 I.A. 22

W. G. Nivins,
Appellee

vs.

No. 37
October Term, 1917.

Illinois Terminal Railroad Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 37. Agenda No.41

October Term, 1917.

W. G. Mivins, Appellee v. Illinois Terminal Railroad Company Appellant	Appeal from Madison.

Opinion by Higbee, J.

---o0o---

The issues and facts in this case are the same in all their essential features as those in the case of Lettmer v. Illinois Terminal Railroad Company, decided at this term, though the land in this case is located about one mile nearer appellant's railroad embankment than the land in the Lettmer case, and the decision in that case must control in this cause.

In this case four special pleas were filed to the declaration. The first three are the same as the three special pleas in the Lettmer case. The fourth special plea in this suit avers that the crops, alleged in the declaration to have been damaged, were grown by appellee as a tenant subsequent to the building of the embankment and that appellee would have no right of action for such damages. This court is based on the theory that the embankment in question was a lawful and permanent structure and that any damages occasioned thereby accrued when it was constructed, the measure of which would be the depreciation in market value of the land or lease hold injured thereby and for which

there could be but one recovery. This suit like the Bettmer case and the case of Urda v. Illinois Terminal Railroad Company also decided at this term is a suit not for the recovery of damages resulting from the construction of the embankment in question but for the recovery of damages resulting from the alleged defective construction of the embankment in that it failed to provide sufficient outlets for the water. What was said by the court in the opinions filed in the Bettmer and Urda cases upon that question must control in this suit.

The instructions complained of in this case are substantially the same as the instructions complained of in the Bettmer and Urda cases and practically the same objections are urged. The holding of the court upon the instructions in those cases fully covers all complaints made of the instructions in this case. The contention of counsel that the verdict here is excessive is based upon the theory that none of the damages sustained by appellee as the result of the ruins of 1913 were shown to have been caused by appellant's embankment. As said in the Bettmer case where the facts were the same, this was a question of fact for the jury, and under the law and the facts in proof this court cannot disturb the finding of the jury in that respect.

In accordance with the views of the court as expressed in the opinions filed at this term in the two cases above mentioned the judgment in this case should be and is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* April *A. D. 191*8

Clerk of the Appellate Court.

NOINI

4073

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 23

C. W. Terry, Trustee,
Appellee

vs.

No. 39
October Term, 1917.

Banner Clay Works, et al,
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 39. Agenda No.53

October Term, 1917.

C. A. Terry, Trustee v. Banner Clay Works, In the matter of C.A.Bartlett, Receiver, Appellee and Edwardsville Home Trade Coal Co., Miller Co., H.J.Jeffress & Co., Objectors to Receiver's Report, Appellants	Appeal from Madison.

Opinion by Higbee, J.

---oOo---

At the March Term, 1914 of the Madison county circuit court C. A. Terry, filed a bill to foreclose a second mortgage, in which he was named as trustee for the bondholders, on the Banner Clay Works, for the sum of $[illegible]. C. A. Boeltig and [illegible] Powell, who were at that time, and have since continued to be partners of C. A. Terry, the trustee, in the practice of law under the firm name of Terry, Boeltig and Powell, filed the bill as solicitors for the trustee. After entry of appearance was filed by the Banner Clay Works, a decree of foreclosure was rendered against the property of the Clay Works named in the mortgage. In accordance with that decree the property was sold by the master in chancery, to [illegible] Powell, a member of the firm of Terry, Boeltig and Powell and at the expiration of the period of redemption a deed was made to him as trustee

for the second mortgage bondholders. On April 2, 1914, upon petition of C. S. Terry, trustee, filed in the foreclosure suit by Gueltig and Lowell, his solicitors, the court appointed C. A. Bartlett, receiver of the Banner Clay Works with power and authority to operate and conduct the business. By stipulation filed in court the first mortgage bondholders waived their first lien and consented to the appointment of the receiver. In the order appointing the receiver, he was authorized to issue receiver's certificates in any sum not to exceed $15,000, which were to be a first lien on the property.

May 2, 1914, the receiver filed an inventory showing the assets, liabilities and bills payable. Among such bills payable was one to Evansville Crown Trade Coal Company for $2,803.24, one to A.A.Miller Company for $[illegible] and one to A.J.Jeffress and Company for $[illegible], these being the parties who are the appellants here. The evidence shows these three items were for wares furnished prior to the filing of the bill for foreclosure, and were not in any way liens against the property involved. The property was sold to Lowell for $2616.10, less than the debt interest and costs, June 24, 1914 and on petition of C. S. Terry, trustee, a deficiency judgment for that amount in his favor and against the Banner Clay Works was entered, extended nunc pro tunc and execution awarded. June 16, 1915, the court approved a report of the receiver and directed him, out of any funds in his hands as such receiver, to pay himself the sum of $1500 as fees for his services to date, and also out of such funds, to pay his attorneys, Terry, Gueltig and Lowell the sum of $1500 as fees for services rendered by them

to date. The record shows appellants had appeared in court and filed their claims before this order of court approving the receiver's report was entered. At the January term, 1916 of said circuit court the receiver filed his report showing that on account of bad market conditions he was not able to conduct the business with any profit and asking that he might be directed to sell all brick and all mortgaged property on hand; that out of the net proceeds of such sale he be directed to pay the receiver' certificates outstanding, together with all other claims against him as such receiver, and that any money remaining be paid out under the further order of the court. The cause was referred to the master in chancery to take the evidence and report his conclusions of law and fact. Appellants filed objections to certain items paid out by the receiver for which he had taken credit in the report and the master overruled the objections. Exceptions to the master's report were filed and upon hearing before the court these were overruled and a decree entered approving the master's report and ordering that appellants pay the costs made by the hearing on the objections, from which decree this appeal was taken. It appears to be the contention of appellants that their claims should be paid in full before any assets of the Denver Clay Works are applied in payment of the items objected to. In their argument counsel for appellants say "we ask that the decree be reversed and the objections be sustained to the receiver's report, and the receiver directed to pay the claims of these creditors out of the assets now in his possession as receiver of which, in the proper administration of affairs as receiver, he should now have in his possession."

The claim of Edwardsville Home Trade Coal Company appears to consist of a note dated May 7, 1912 for $1500 and interest thereon and a balance of $1543.11 on an open account for coal furnished prior to the receivership; that of the J.A. Miller Company of an open account for goods sold prior to April 4, 1913, and that of J.J.Jeffries and Company of a note dated July 23, 1913 for $482.60 and interest thereon. All these claims were unsecured and no attempt had been made to reduce them to judgment. The items in the receiver's report which seem to be objected to are: the items of $1000 fees to Gueltig, and Powell, as solicitors for the trustee in the foreclosure, $150 as fees to Terry, Gueltig and Powell as solicitors for the receiver, $250 to E.F. Luth for money advanced prior to the receivership, certain items to C.W.Meyer, Dr. J. Baron, F. Brokmeyer, and Dunlap Pippold Co. and also certain items for repairs. Aside from the question whether appellants being simply unsecured creditors, are in position to raise the question here sought to be raised, the decree of the court appears to be substantially correct.

The receiver issued approximately $14 00 worth of receiver's certificates, which were declared to be a first lien upon the property in the hands of the receiver. Conceding that the allowance of $1500 to Terry, Gueltig and Powell as solicitors for the receiver were improper, yet the trustee is not contesting that allowance, and the deficiency judgment for $2616.16 in his favor would more than absorb that amount. The evidence tends to show that the proceeds of the receivership will not be sufficient to pay the outstanding receiver's certificates and the deficiency

judgment, after paying the necessary costs of the receivership, aside from solicitor's fees. The evidence further shows that the fees, allowed Cheltis and Powell as solicitors for the trustee in the foreclosure suit were paid by the bondholders, who were the judgment creditors and also the purchasers of the mortgaged property. The propriety of the allowance of that fee, which was not paid out of any funds in the receivership, cannot be questioned here as it did not affect appellants' rights or result in any injury to them. The objection to the F. Luth item of $96 is not well taken. It appears this money was advanced by Luth to meet the monthly payroll immediately prior to the receivership, and the receiver enjoyed the benefit of the labor for which that money paid. Claims for current expenses of the ordinary operation of the business incurred within a limited time before the receivership were proper charges against the receivership fund. 34 Cyc 306. It was no doubt upon this theory the trial court allowed and the receiver paid, appellant, Edwardsville Home Trade Coal Co., the sum of $123 for coal furnished just prior to the receivership.

As to the Meyer, Baron, Krohmeyer and Lumlan-Tiopdd items the evidence is not altogether clear. It appears, however, that at the time the bill to foreclose was filed, there was a large quantity of brick in the yard, either in the kilns or in separate piles. To each kiln or pile was attached a placard stating that such kiln or pile had been sold to one of the above mentioned parties, naming him, and each of them held a bill of sale for the brick sold him. Appellants claim there was an unpaid balance of $713.20 due from Meyer for the brick so purchased by him, a like

balance of $512.68 from Baron, $80 from Lindsey and $256.20 from Dunlap-Tippold. These bills of sale were all issued prior to the receivership and each of the parties had given notes for a portion of the price paid, but the exact amount each one owed could not be determined until a recount of the brick was made. Appellants claim that neither the brick nor the different balances due, therefore were accounted for by the receiver. It does appear, however, that the price of brick having advanced, and the receiver, having orders to fill, under an agreement with these different parties sold the brick on their respective accounts, and that these parties or some of them agreed, if the receiver would pay the interest upon the notes they had given for the purchase price they would forego any profit. The manner they agreed received the money on these notes by assigning the same prior to the receivership and the profits derived from this transaction were fully accounted for by the receiver. When the receiver assumed control of the business and property, he found these conditions and he was compelled to take the property as he found it. (Chicago Title & Trust Co. v. Smith, 188 Ill.417; Willem v. Meebaum, 98 Ill.App.177) The items of interest paid by him in this transaction were properly allowed. No sufficient reason has been advanced why the items for "repairs and betterments" should not be allowed. It is true that the plant has not been operated since such repairs were made but they were made after the plant, as was customary, had been closed for the winter and if repairs they would have been necessary had the plant been continued. They seem to have been made in good faith and

the receiver was properly given credit for them.

The evidence does not support the contention of appellant that Bartlett agreed to serve as receiver for a fee of $822, that being the amount due him from the company for insurance premiums. The appointment of the receiver was ancillary to the foreclosure proceeding and was for the benefit of the parties thereto, and possibly other lien creditors and not for the benefit of the ordinary creditors, whose claims arose prior to the filing of the bill for foreclosure, (Young v. Clay, 147 Ill.176).

The decree in this case should be and is affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 4th *day of* August *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

INION

Neg 1073

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 31

W. A. Metcalf,
Appellee

vs.

No. 49
October Term, 1917.

Chicago Sandoval Coal Company,
Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. JAMES C. MC BRIDE

Term No. 49. Agenda No.56.

October Term, 1917.

W. A. Metcalf, Appellee v. Chicago Sandoval Coal Company, Appellant	Appeal from Marion.

Opinion by Higbee, J.

---oOo---

This is an action on the case brought by appellee to recover damages for personal injuries alleged to have been sustained by him on September 20, 1916 while working as dock boss for appellant at its mine at Sandoval, Illinois.

The declaration consisted of seven counts, each one alleging in substance that appellee was employed by appellant; that in the course of his employment it was his duty to inspect the coal as it was dumped from a basket on to a screen, for the purpose of detecting whether there was any sulphur or other impurities in the same; that it was the duty of appellant to furnish appellee with a reasonably safe place in which to work and that appellant not regarding its duty in that behalf, carelessly and negligently failed to provide appellee with a safe place in which to work in that it failed to properly protect appellee against flying particles of coal, and as a result thereof a particle of coal struck appellee in the right eye destroying his eyesight. Each count alleged appellant had filed with the industrial board its election not to provide and

pay compensation according to the provisions of the workmen's Compensation Act. The plea of general issue was filed, and upon trial before the court and a jury a verdict was returned for appellee in the sum of $2000.

Counsel for both parties in their statements devote considerable space to stating in detail the evidence showing the construction of the tipple, basket and screen where appellee worked, and the manner of operating the same. This evidence is quite voluminous, but under the view of the case taken by this court it would be useless for the purpose of this opinion to repeat such evidence in detail here. There is no dispute as to the construction of the tipple, basket or screen, nor is it disputed that appellee was injured and as a consequence lost the sight of his right eye. Appellant offered no evidence on the trial but at the close of appellee's evidence requested the court to direct the jury to find appellant not guilty. Whereupon appellee, by leave of court, reopened his case and offered in evidence a certified copy of appellants notice, filed with the Industrial Board, of its election to reject the provisions of the Workmen's Compensation Act. While this certificate did not bear the seal of the Industrial Board, the court admitted it in evidence. No proof whatever was made as to the posting or service of the notice as required by section two of the Act. Appellant then renewed its motion for a peremptory instruction, which was again denied. Appellant insists that the trial court erred in holding it had jurisdiction of the cause and that its peremptory instruction should have been given. As this judgment must be reversed for other reasons and any informality of insufficiency of proof in

regard to the question whether appellant had rejected the provisions of the Workmen's Compensation Act, may be remedied on another trial, we need not discuss the question here.

On the trial appellee was permitted to prove, over the objection of appellant, that the screen could have been made more safe, if it had been protected by a fine wire, a screen or piece of sheet iron. The question for the jury was not whether the screen could have been made safer, but whether it was reasonably safe in the condition it then was. In the case of Kennedy v. Chicago & Carterville Coal Co., 180 Ill.App.42 in an opinion touching a similar question, it was said "The question before the jury, however, was not as to whether other modes were safe or safer, but was the mode adopted reasonably safe and our Supreme Court has held it to be reversible error to show that a safer mode could have been adopted", citing Brossman v. Drake Standard Machine Works, 232 Ill.412, and Casey v. Leedy Elevator Mfg.Co.,142 Ill.App.126. These cases are in point here and under their authorities it was reversible to admit this evidence.

The court at the request of appellee gave the following instruction to the jury, "The court instructs the jury that it is the duty of the defendant to furnish and provide the plaintiff with a suitable and reasonably safe place in which to perform the work and labor required of him; and if you find from a preponderance of the evidence in this case that the defendant failed and omitted to furnish the plaintiff with a reasonably safe place in which to work in the manner charged in the declaration, and by reason of its failure to so provide a reasonably safe place, if the evidence shows that it did fail, then the plaintiff

would be entitled to recover any damages that he might have sustained, if any have been shown by the evidence." By this instruction the jury are told in substance they should find for the appellee if they believe from a preponderance of the evidence that appellant had failed to furnish appellee a reasonably safe place in which to work. They are not told that such failure to provide a reasonably safe place to work must have contributed in some manner to appellee's injury. This instruction undertook to state conditions which would entitle appellee to recover a verdict in his favor, and as it wholly failed to require casual connection between appellee's injury and the negligence charged against appellant, it was erroeneous. (Hurst v. Madison Coal Co., 201 Ill.App.205) The instruction was further defective in that it informed the jury that under the circumstances named appellee would be entitled to recover any damages that he might have sustained, if any had been shown by the evidence, without confining his damages to those stated in the declaration. This left the jury free to assess whatever damages they might think under the evidence, appellee had sustained, unguided by any legal rule of damages, and without limiting them to the damages charged in the declaration. Such instructions have been condemned by our courts of appeal. (Boggs v. Iowa Central Ry.Co.,187 Ill.App.621 and authorities there cited). This instruction also improperly stated the duty imposed by law upon appellant in informing the jury, "It is the duty of the defendant to furnish and provide the plaintiff with a suitable and reasonably safe place in which to perform the labor and work required of him", whereas under the authorities it was only appellant's duty to use reasonable care to provide him with a reasonably safe working place

(Collins v. Western Electric Co. 178 Ill.App.23) An examination of the record shows that this instruction was not cured by other instructions given.

For the reasons above given the judgment in this case will be reversed and the cause remanded.

Reversed and remanded.

McBride, J., took no part on the hearing of this case.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* April *A. D. 191*8

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 44

Frank Wadley,
Appellee

vs.

No. 65
October Term, 1917.

Schwartz Brothers Express Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

City COURT

East St.Louis ~~COUNTY~~

TRIAL JUDGE

HON. H. L. BROWNING

Term No. 66. Agenda No.23

October Term, 1917.

Frank Wadley, Appellee v. Schwartz Brothers Express Company, Appellant.	Appeal from City Court of East St. Louis.

Opinion by Higbee, J.

---oOo---

Appellee Frank Wadley brought an action for damages against appellant Schwartz Brothers Express Company, to recover for injuries sustained by him November 27, 1916, in a public street in the city of East St. Louis, Illinois, which he claims were caused by the negligence of the servant of appellant.

There were two counts in the declaration but the second was taken from the jury by the court at the conclusion of plaintiff's evidence. The first count upon which the case went to the jury alleged that appellant on the day named was possessed of and operating a certain express and delivery business in and about the city of East St. Louis and in connection therewith certain teams, wagons and buggies were used which were under the control and management of its servants; that a certain servant of appellant named Henry Roy was in charge of one of its horses and buggies engaged in its business; that Roy carelessly and negligently drove and managed said horse over a public street in said city so as to cause

the same to run upon and against appellee who was then and there in the exercise of due care for his own safety and that by reason of such negligence on the part of said servant, appellee was then and there hurt, crushed, bruised and injured. The jury returned a verdict in favor of appellee in the sum of $1[illegible] for which amount judgment was given against appellant and the latter has prosecuted an appeal to this court.

Appellant claims that the verdict is against the weight of the evidence and that the court erred in not directing a verdict in its favor and its argument in this court is devoted solely to the discussion of the questions of fact involved in the case. Broadway in the City of East St. Louis runs east and west and Main street north and south, and it was at the intersection of these two streets where the traffic is heavy that the injury occurred. Appellee, a man sixty six years of age, was at the time of the accident, in company with another man going from the southeast corner of the intersection of said two streets, diagonally across to the northwest corner. Roy, a servant of appellant was driving a horse and buggy belonging to the latter, east on Broadway, intending to turn north on Main street. It was conclusively shown that Roy was driving east on the north side of the street. Appellee, who was walking on the right side of his companion, looked up Broadway eastward for approaching vehicles, and as he reached a point some 10 or 12 feet from the sidewalk, and just as he turned his head to the west, he was knocked to the pavement by appellant's vehicle, both wheels passed over him, and he received the injuries for which he brought

suit. His companion, who was west of appellee, from which direction the vehicle was coming, saw the same just in time to escape injury, but was so near the vehicle that the wheels barely missed him. He called to appellee but the warning came too late to save the latter from injury. Not only was appellant's horse and buggy on the wrong side of the street, that is the north side going east but it was also proven by appellee's witnesses that the horse was being driven at a lively gait, one witness stating at the rate of eight miles per hour, while no evidence was offered by appellant as to the rate of speed at which the horse was going.

There was no material conflict in the evidence as to the circumstances surrounding appellee's injury. The questions of negligence on the part of appellant's servant and the exercise of due care on the part of appellee, were questions of fact for the jury and the proofs plainly showed a right of recovery in appellee. The judgment of the court below will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th *day of* April *A. D. 1918*

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 53

James Smith,
Appellee

vs.

No. 73
October Term, 1917.

Saline County Coal Company,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 73. Agenda No.44

October Term, 1917.

James Smith, Appellee	
v.	Appeal from Saline.
Saline County Coal Company, Appellant	

Opinion by Higbee, J.

---oOo---

This is an action to recover damages for personal injuries sustained by appellee on June 22, 1916, while employed by appellant in one of its mines. On the trial before the court and a jury, a judgment for $4000 was rendered in favor of appellee.

The declaration consisted of four counts. The first count alleges in substance that tracks were laid in the rooms of the mine over which loaded and empty cars were hauled by electric motors; that the track in room No. 33 off of the second east entry off of the second north entry on the east side of the mine, was in a dangerous condition in that the rails where they connected were so curved and bent as to be likely to cause cars passing over the same to be derailed; that on June 22, 1916, while appellee was operating an electric motor in pushing a car over this track in room No.3, the car, by reason of such dangerous condition of the track, was derailed and appellee's leg was broken and he was otherwise injured; that appellant negligently failed to maintain its said track in a reasonably safe condition, and because of such negligence appellee was injured. The second, third

Term No. 73. [illegible] c.44

[illegible] Term, 1924.

James Smith.

/Appellee

v.

Dallas County [illegible] Company,

Appellant

[illegible] Opinion by [illegible].

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

and fourth counts charged appellant with a violation of its duty under the Mining Act, to have the track examined by its mine examiner and to withhold appellee's entrance check until the track should be made safe. A plea of the general issue was filed.

The only evidence introduced by appellant was the testimony of its assistant superintendent, who stated that in a conversation immediately after the accident, appellee, told him that "after the car jumped it caused the car to kick up on the end of the motor and that he reached for the three-way switch and let it drop, causing the motor to make a second lunge and injured his leg", and also "that if it had not been ~~dxx~~ for dropping the switch he would not have been injured".

Counsel for appellant has argued only two assignments of error namely, that the declaration failed to state any cause of action, in that it does not allege that the injuries of appellee were caused by the negligence of appellant, and that it was error to give appellee's seventh instruction. While the declaration is not perhaps as definite and precise in its allegations that appellee was injured by appellant's negligence as it might have been, it does allege that because of the dangerous condition of the track the car was "derailed and the rear portion of the car was thrown up in the air and as a direct result thereof the front end of the motor upon which the plaintiff was riding and which he was then and there driving and propelling ran under and against the rear end of said car in such manner as to catch the right leg of plaintiff which was broken" etc. It is claimed by appellant that this language amounts only to a description of appellee's leg at the time the car was derailed

and not that the injury was the result of the matters stated. We think the declaration is not properly subject to this criticism but that the words used constitute a sufficient allegation that appellee's leg was broken by being caught between the car and motor, and not that it was at that time already broken.

The seventh instruction given in behalf of appellee is in the following lanaguage, "You are further instructed that if you believe from a preponderance of the evidence that the working place of the plaintiff was in fact dangerous in manner and particular charged in the declaration, eight hours before the time the men were permitted to enter the mine to work therein, then it was the further duty of the defendant company to have caused its mine examiner to have taken up the entrance check of the plaintiff and to have given the same to the mine manager, and to have caused the mine manager to have withheld the plaintiff's entrance checks from him, and to have prevented the plaintiff from entering his working place on said day to work therein except for the purpose of making the same safe, and if you find from the preponderance of the evidence that the defendant has wilfully failed to perform its duty in this regard, then your verdict must be for the plaintiff". The vice of this instruction is that it directs the jury to return a verdict for appellee, if the preponderance of the evidence showed appellant had violated its statutory duty but failed to require that appellee's injury should have been the result of appellant's said neglect of its statutory duty.

It is a fundamental principle of the law relating to actions for personal injuries that the injuries complained

and not that the injury was [illegible] noted. To think the distinction is [illegible] criticism but [illegible] legation that a [illegible] be- tween the car and motor, [illegible] already shown.

The [illegible] is in the following language, [illegible] that if you believe from [illegible] evidence that the working place [illegible] motor and [illegible] before the time the [illegible] work therein, then it was the [illegible] company to [illegible] caused [illegible] the entrance check on the [illegible] came to the [illegible] to have taken the [illegible] and [illegible] ing [illegible] the [illegible] ence [illegible] to perform [illegible] be for the [illegible] that it [illegible] if the [illegible] [illegible]

[illegible]

of must be the natural and proximate consequence of the negligence charged. This instruction entirely omits the essential qualification that the evidence must show that such failure on the part of appellant to perform its statutory duty, contributed to appellee's injury to entitle him to recover and the giving of it was reversible error. (Hurst v. Madison Coal Corporation, 201 Ill.App.205; C. & N.W.Ry.Co.v.Carroll 12 id.643.)

The judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 6th *day of* March *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Rec'd 6/22/18 1/102

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the ~~fifth~~ 22nd *day of* ~~April~~ June *A. D. 1918, there was* ~~filed~~ refiled *in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

211 I.A. 66

Robert L. Finley,
Appellee

vs.

No. 77
October Term, 1917.

Federal Life Insurance Company,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Randolph COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 77. Agenda No.65.

October Term, 1917.

Robert L. Finley, Appellee v. Federal Life Insurance Company, Appellant	Appeal from Randolph.

Opinion by Higbee, J.

---oOo---

The appellee, Robert L. Finley, recovered a judgment in the circuit court of Randolph county against appellant, the Federal Life Insurance Company for $2500 on a policy of accident insurance, issued by that company to him, September 1, 1916, insuring him against loss resulting from "external, violent and purely accidental means".

The defense relied upon by appellant was that the injury was self inflicted and that certain answers made by appellee to material questions in the application for the insurance were nottrue.

It appears that appellee, a practicing physician residing at Evansville, Illinois, made application for insurance to appellant's Company, August 31, 1916; that a policy was issued to him September 1, 1916; that on September 11, 1916 while alone in his office about 12:30 P.M. he sustained an injury by being shot in the left leg just above the ankle joint necessitating the amputation of that limb about twelve inches below the knee. It is insisted by appellant that the burden was upon appellee to establish by a preponderance of the evidence the injury was effected solely, directly and

Term no. 77. Agenda No.65.

October Term, 1917.

Robert L. [illegible], appellee, v. Federal Life Insurance Company, appellant	[illegible] from [illegible].

Opinion by [illegible].

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The appellee, Robert [illegible], recovered a judgment in the circuit court of [illegible] county [illegible] against the Federal Life Insurance Company [illegible] on a policy of accident insurance, issued by that company [illegible], September 1, 1916, insuring him against loss resulting from "external, violent and visibly accidental means".

The defendant [illegible] by [illegible] that the injury was not inflicted [illegible] means by appellee to [illegible] for the injuries were [illegible].

[illegible] upon [illegible] insurance [illegible] that such a policy was issued [illegible] sustained an injury by [illegible] the ankle joint [illegible] the [illegible] five years before [illegible] contended that the [illegible] upon [illegible] the evidence the injury was inflicted [illegible] directly and

independently of all other causes through external, violent and purely accidental means, and was not self inflicted. Also that appellee failed to establish such facts by a preponderance of the evidence and that it was error for the trial court to refuse appellant's peremptory instruction directing the jury to return a verdict in its favor. There were no eye witnesses to the accident save appellee and he testified positively that the accident was purely accidental and the injury was not self inflicted. Proof introduced by appellant tended to show appellee was in straightened financial circumstances and in need of money to settle a serious charge made against him by one Ullman Wherheim; that while appellee had no hunting license he borrowed the gun a few days before the accident stating he intended to go squirrel hunting during the noon hour.

While it is true the burden of proof was upon appellee to show the injury was accidental and not self inflicted yet he had the right to invoke the presumption that men do not ordinarily take their own lives or inflict injury upon themselves. "The presumption of the law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of contervailing proof, may be sufficient, within itself, to establish prima facie that death occurred otherwise than by self destruction and to cast upon the defendant company the burden of producing evidence on the point". Fidelity and Casualty Co. v. Weise, 182 Ill. 496; Wilkinson v. Aetna Life Ins. Co., 240 id.206. While this presumption is not conclusive and may be overcome by proof yet when to it is added appellee's testimony, the evidence was sufficient to

independently of all other causes through external, violent and purely accidental means, and was not self inflicted. Also that appellee failed to establish such facts by a preponderance of the evidence and that it was error for the trial court to refuse appellant's peremptory instruction directing the jury to return a verdict in his favor. There were no eye witnesses to the accident [illegible] appellee and he testified positively that the accident was purely accidental and the injury was not self inflicted. Proof introduced by appellant tended to show appellee was a married man, circumstances and it was [illegible] to appellee's character made against him by one Clinton Barrett; that while appellee had no hunting [illegible] a few days before his accident [illegible] intended to go squirrel hunting during the noon hour.

While it is true the burden of proof was upon appellee to show the injury was accidental and not self inflicted yet he had the right to rely on the presumption that men do not ordinarily take their own lives or inflict injury upon themselves. The presumption is that all men are sane and [illegible] animated by the instincts of self-preservation and [illegible] to avoid accident, injury and death. [illegible] the general [illegible] conservative [illegible], within itself, to [illegible] wise [illegible] defendant company [illegible] ent".

[illegible] Kinson [illegible] assumption is not [illegible] when to it is added appellee's testimony, [illegible] sufficient to

require the court to submit to the jury the question whether the injury was "effected solely, directly and independently of all other causes though external, violent and purely accidental means" or was self inflicted; and under the proof in the record this court cannot say that the verdict of the jury in this respect was so manifestly against the weight of the evidence that it should be set aside. There were certain questions in the application which it is insisted by appellant were material, and the answers to which are claimed to have been warranties or material representations. These answers are said by appellant to have been false and it contends that by reason of such falsity the policy was null and void. They were as follows:

"10. "hat are your average monthly earnings?"

Ans. "200".

"18. Are your habits of life correct and temperate?"

Ans."Yes."

There were sixteen instructions given in the case, one in behalf of appellee and fifteen in behalf of appellant. All the instructions in the case on the question of what answers are warranties of representations of such material facts that their falsity will render the policy void, in cases of this nature, were given in behalf of appellant, so that it cannot be heard on this appeal to complain that the jury was improperly instructed on that question. The only evidence introduced by appellant in any way tending to show that appellee at the time of making application for the insurance did not have a monthly income of $200, was that at the time of the trial he was the owner of no real estate, had not to exceed $50 in cash and his personal property was worth not to exceed $400.

require the court to submit to the jury the question whether the injury was "effected solely, directly and independently of all other causes through accidental, violent and [illegible] accidental means" or was [illegible] and under the proof in the record this court [illegible] the [illegible] of the jury in this respect was [illegible] weight of the evidence that it should not [illegible] certain questions in the application [illegible] applicant were material, and the [illegible] claimed to have been warranties or [illegible] These answers are said [illegible] that by reason of [illegible] void. They were as follows:

"Q. What was your average [illegible] earnings?"

Ans. "[illegible]."

"Q. Are your habits of life correct and temperate?"

Ans. "Yes."

There were thirteen [illegible] in the case, one in behalf of [illegible] and twelve [illegible] applicant. All the instructions [illegible] of what answers were warranties [illegible] material facts that the [illegible] void, in case of false [illegible] to find in favor of the defendant, so that it cannot be [illegible] in that the jury were [illegible] evidence introduced [illegible] that [illegible] in order [illegible] that at the time of the [illegible] accident, and not to exceed [illegible] the worth not to exceed $[illegible].

Considerable testimony was offered by both parties upon the question whether appellee's habits of life were "correct and temperate". This evidence was conflicting but as the jury were properly instructed on this question and the facts upon the whole tended to sustain their finding, that finding should not be disturbed. It is also urged by appellant that the court erred in not permitting it to introduce proof that appellee on two different occasions had made improper proposals to women patients of his. One of these occasions was a few months and the other several years before he made application for the insurance. We are of opinion the proffered proof has not material bearing upon the issues in the case and that the court did not err in rejecting it.

The following is the only instruction given the jury in behalf of appellee:

> "The court instructs the jury that if you believe from the evidence that the Federal Life Insurance Company issued the policy sued on and that said policy was based upon the application endorsed thereon and that the answers to the questions in said application by Doctor Finley were true at the time they were made and that Doctor Finley has lost his left foot by accident as charged in the declaration then your verdict should be for the plaintiff".

Appellant urges that this instruction is erroneous in that the question of appellee's habits was confined to what such habits were on August 31, 1916 the day he made application for insurance. A fair consideration of this instruction will not sustain so strict an interpretation of it. The jury could not have understood from this instruction that they were to pass upon appellee's habits only on that day. Furthermore in four of appellant's instructions the habits of appellee were referred to as "at the time the application for the policy was made". These words in effect are the same as those complained of in appellee's

Considerable testimony was offered by both parties upon the question whether appellee's habits of life were "correct and temperate". This evidence was conflicting but as the jury were properly instructed on this question and the facts upon the whole tended to sustain their finding, that finding should not be disturbed. It is also urged by appellant that the court erred in not permitting it to introduce proof that appellee on two occasions had made improper proposals to women patrons of his. One of these occasions was a few months prior to the other, several years before the date of application for the insurance. Where an application for the procuring of a policy of insurance is not material, upon the issues in the case and that the court did not err in rejecting it.

The following is the only instruction given the jury in behalf of appellee:

"The court instructs the jury that if you believe from the evidence that the mutual life insurance company issued the policy sued on and that said policy was based upon the application exhibited therein and that the answers to the questions in said application were true at the time they were made, and that Doctor Tilley did not in fact know of material facts omitted in the description to our doctor, then your verdict should be for the plaintiff".

Apparently on the trial and in the argument in error, the question was the direct issue of whether appellee's habits were confined to what such results were represented to be, yet the day he made application for insurance. The consideration of this instruction will not warrant us in [illegible] a reversal of it. The jury could [illegible] by this instruction that if they [illegible] only on the [illegible] transaction [illegible] subsequent [illegible] time the application [illegible] "correct habits" in effect and the more [illegible] of an application

instructions. Even if appellee's instruction was erroneous in that respect appellant could not raise that question for the reason that a party has no right to complain of an error in an instruction when a like error appears in an instruction given at his own request". (C.& A.R.R.Co.v.Harrington, 192 Ill.9; Brennen v. Carterville Coal Co.,241 id.610.) It is also urged this instruction is erroneous because it assumes that an accident happened. This objection is not well taken as the instruction expressly tells the jury that to entitle appellee to recover they must believe "from the evidence" certain things among them that appellee "lost his left foot by accident as charged in the declaration". It is also insisted that the court erred in modifying appellant's instructions one, three, four, five and fourteen. It is sufficient answer to this claim to say that an examination of the record fails to disclose that any of the instructions presented by appellant were modified by the Court.

Appellant also urges as further reasons for the reversal of the judgment in this case that it was error for the court to give certain other instructions offered by it. Even though such instructions were erroneous, appellant cannot take advantage of such error. A party cannot complain of an instruction that the court gives upon his own request (Judy v. Judy, 201 Ill.470; C.& A.R.R.Co.v.Kelly, 182 id.267; C.P.& St.L.Ry.Co.v. Leah, 152 id.249).

The facts tend to support the verdict, no reversible error appears in the record and the judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this The 25th *day of* April June *A. D. 1918*

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the ~~fifth~~ 22nd *day of* ~~April~~ June *A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:* refiled

211 I.A. 68

Silas Williams, Admr.,
Appellee

vs.

No. 3
October Term, 1917.

Mt. Vernon Car Mfg. Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Jefferson COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 3. In the Appellate Court, Agenda No.3

Fourth District.

October Term, A. D. 1917.

Silas Williams, Administrator of the estate of Willie Williams, deceased, Appellee. vs. Mt. Vernon Car Manufacturing Company, Appellant.	Appeal from the Circuit Court of Jefferson County.

Kerride, J.

Upon a trial had in the Circuit Court of Jefferson County judgment was rendered in favor of appellee and against appellant for five thousand dollars and costs, which it is sought to reverse by this appeal.

The appellant is a corporation engaged in the business of manufacturing and repairing of cars at Mt. Vernon, Illinois, and the appellee's intestate at the time of the injury and death was engaged at the work of lining cars with paper.

It appears from the evidence that the injury and death of appellee's intestate occurred on January 8, 1912, and that the appellant was not at that time operating under the compensation act of 1911, which was then in force.

The plant of the appellant is located near Mt. Vernon, Illinois, covers a large area of ground. The work of constructing cars is divided into several different apartments, one of which is what is known as the steel plant in which the steel car frames are built; another is the mill building and still another is what is called the set-up

shop, in which the injury in question occurred, and lies directly west of the mill building. This set-up shop is about sixty feet wide and three hundred fifty feet long and within its inclosure are three railroad tracks, commonly called North track, middle track and South track, and they are so arranged that the frames of cars are pushed in from the west on to these tracks for completion and each track is of sufficient length to hold about eight cars with spaces of three to six feet between each of them.

When the cars were completed engines were pushed in from the west coupled the cars together and pulled them out to another part of the yard, and this was called "pulling the track," and at such times it appears that warnings were usually given by the sounding of the whistle upon the engine, ringing of the bell and by men running up and down the sides of the cars giving notice that they were about to "pull the track." South of this set-up shop was what is called the paper house and to the east of that is a paint shed, and still east of that are other shops. The south side of the set-up shop building was practically open, large open spaces at short intervals. At the north west corner of the appellant's premises the switch tracks connect with the T. & N. Railroad Company tracks. When the cars were standing upon the tracks in the set-up shop for completion there would be spaces of from three to six feet between the cars, left for the purpose of permitting the men while engaged at work to pass in between the cars. There were about two hundred fifty men engaged in work in each of these apartments. On the day in question the deceased, Willie Williams, was engaged in the finishing up of the inside of the cars and he and Albert Williams were working together on

[illegible]

a car located on the middle track and at about 11:30 o'clock in the morning he went to the paper house south of the shop to procure some rolls of paper to be used in the lining of the car. He secured two rolls of paper and as he was returning, carrying a roll of paper under each arm, as he attempted to pass between the third and fourth cars on the south track he was caught between the cars and killed.

It is claimed by appellee that the engine was pushed in on this south track and hooked on to these cars while the deceased was down at the paper house and that he knew nothing of the engine being there.

Appellant claims that the engine was in plain view of the deceased at the time he passed in between the two cars. The custom was to attach the engine to the first car and then to the second and afterwards to the third and so on and it is claimed by appellant that the usual course was pursued at this time and that the usual warning was given before the engine was attached to any of the cars and as it pushed back from car to car. As to what occurred at that time and the manner of pushing the engine and coupling up the cars the evidence is somewhat conflicting.

This case was heard at a former term of this court and the cause reversed and remanded because of the giving of improper instructions. Another trial was had in the Circuit Court and judgment was again rendered for the plaintiff, to reverse which this appeal is prosecuted.

It is contended by appellant that the declaration was not sufficient upon which to render a judgment for the reason, as it alleges, that it fails to aver that the deceased did not know the cars were being coupled together, and does not set forth the duties required to be performed

a car located on the side of a road [illegible]
in the morning he went to [illegible]
to [illegible] police [illegible]
the car. [illegible] two [illegible]
turnpike, [illegible] a [illegible]
attempted to [illegible] between the [illegible]
south [illegible] county [illegible]

[illegible] by [illegible]
pushed to [illegible]
while the deceased [illegible]
knew nothing [illegible] the engine [illegible]

Accident [illegible]
view of the deceased [illegible]
two cars. [illegible]
car was [illegible] to the [illegible]
[illegible] and it is [illegible]
was [illegible] and [illegible]
given [illegible] the engine was [illegible]
and [illegible]
at that time [illegible]
line [illegible]

[illegible]
and [illegible]
of [illegible]
court [illegible]
to [illegible]

[illegible]
was not [illegible]
[illegible]
[illegible]
and does not [illegible]

by the deceased, and that it fails to state the duty of the defendant. We do not believe these points are well taken; the declaration, as we read it, does aver that it was the duty of the defendant to use reasonable care in the operation of its engine in and about the hauling of the cars along the tracks so as to avoid injury to the employes of said defendant who might be crossing said tracks, and then avers that the defendant negligently and carelessly operated the said engine by negligently and carelessly driving or propelling the same over and along the said railroad track and against the first of said cars then and there standing on said track, with such force as to violently push and move said cars and cause the same to crash together with great force and violence without first giving reasonable warning of their intention so to do. The former part of the declaration also sets forth the duties in which the deceased was engaged, and then avers that while the deceased was crossing the said track in the discharge of his duties as a liner he was caught and crushed between said cars. We believe that the necessary elements to constitute a good cause of action were set forth in the declaration and would be good especially after verdict. Vogrin vs. The American Steel & Wire Co., 263 Ill., 474.

It is further insisted by appellant that it does not appear from the evidence in this case that the defendant was guilty of the negligence charged, and while it is not denied that the engine was pushed back against the cars and caused the several cars upon that track to be coupled up, and that in so coupling them the deceased was caught between the third and fourth cars and crushed; but insists

by the deceased, and that it fell [illegible] of the defendant. [illegible] taken; the declaration, [illegible] duty of the defendant to [illegible] tion of its engine [illegible] along the tracks [illegible] said defendant who [illegible] avers that the [illegible] the said engine by negligently [illegible] propelling the same over and [illegible] and against the first [illegible] said track, [illegible] said fire and [illegible] force and violence [illegible] of their intestate [illegible] action after [illegible] engines, and that [illegible] and the said track in the [illegible] he was [illegible] that the [illegible] operating [illegible] Carr [illegible] Ill., 579.

[illegible]

not [illegible] death was [illegible] not [illegible] and [illegible] up, and [illegible] resulting [illegible] between the [illegible]

that the cars were moved in the usual manner for moving cars and that the deceased was duly warned of their movement. It is true that the evidence tends to show that two or three persons ran along the side of the cars hallooing to all to look out that they were about to couple up the cars on that track and "pull the track" as they termed it, and there was some evidence tending to show that one of the witnesses saw the deceased about to pass between the cars and warned him not to come and that he hesitated and then moved on. It is also claimed that the bell upon the engine was ringing and that the whistle blew several blasts before commencing to couple up the cars. It further appears from the evidence that there was a great deal of noise in and about the place where this occurred. That there were about two hundred fifty men engaged at work, some hammering iron, others nailing and many of them engaged in different pursuits, all of which were more or less noisy, which cause apparently an immense amount of noise at this place. The deceased was engaged as a liner of cars and was at work upon a car on the middle track when it became necessary for him to leave his place of work and go down to a supply shop, about fifty yards distant, for some paper and so far as appears from the evidence the blasts of the whistle and the men running up and down the track may have occurred while the deceased was at the supply shop and before his return to the track and that he knew nothing thereof; and as to the warning that it is claimed to have been given to him personally it appears that he was about to pass between the third and fourth cars when one of the witnesses hallooed at him, that he hesitated and then passed on and it does not appear, and no one can know, whether he understood and appreciated the warning that

that the cars were moved in the [illegible]

cars and that the deceased [illegible]

it is true that the evidence tends to show that [illegible]

persons ran along the side of the [illegible]

look out that they were about to couple [illegible]

track and "pull the train" as they [illegible]

some evidence tending to [illegible]

the deceased about to pass between [illegible]

not to come and that he [illegible]

also claimed that the [illegible]

that the [illegible] couple [illegible]

couple up the cars. It further [illegible]

that there was a great deal of [illegible]

where this occurred. That there [illegible]

fifty men engaged in [illegible]

ing and many of them [illegible]

which were [illegible]

immense amount of [illegible]

engaged as a [illegible]

the minute [illegible]

his [illegible]

yards [illegible]

evidence [illegible]

and [illegible]

of the [illegible]

that [illegible]

in [illegible]

that he [illegible]

then [illegible]

and then [illegible]

know, [illegible]

given. If the defendant was guilty of negligence in failing to give proper warning before the deceased started in between the cars, as the jury found it did, then the defendant could not excuse itself by saying it gave warning at the moment the deceased was in peril without showing that he understood that warning and that it was given under such circumstances as he could have escaped from the impending danger. Appellant recognized that before attempting to couple these cars together, on account of the number of men engaged at work upon them that it was necessary to give some kind of warning but no particular system of warning had been adopted. As the evidence shows, sometimes they would blow one or two blasts of the whistle, at other times four or five blasts and at other times they would ring the bell; but at this time the engineer was unable to tell how many blasts of the whistle he blew, and the witnesses differ as to the number and some of the witnesses who were present and close to the cars heard the blasts of the whistle and others did not but with all the noise and confusion that existed in this set-up shop it is, in our judgment, a question of fact for the jury to determine whether or not sufficient warning was given before attempting to couple up the cars. It is quite clear that if appellant had caused some one to have been at the end of the car before it was started to couple with the following car and after that coupling was made then passed on to the end of the other car and made a coupling that there would have been no danger of any one being injured by reason of passing between the cars while engaged at their work. A distance of from three to six feet was left between these cars for the purpose of par-

given. If the defendant was guilty of negligence in failing to give proper warning before the deceased entered in between the cars, as the jury seem to find, then the defendant could not excuse itself [illegible] the moment the deceased was in sight without warning that he understood that warning and that it was [illegible] under such circumstances he could have avoided injury [illegible] danger. [illegible] recognized the better [illegible] couple that came together, so account [illegible] men engaged in work upon them [illegible] give some kind of warning but no [illegible] system of warning had been adopted. [illegible] the evidence [illegible] would blow one or the other of the [illegible] four or five [illegible] bell; [illegible] many [illegible] to the number and [illegible] and close to [illegible] others [illegible] existed in this [illegible] tion of fact for the jury [illegible] negligent warning [illegible] the cars. [illegible] [illegible] made a [illegible] one being [illegible] while [illegible] six feet [illegible]

mitting the men to pass between the cars in the discharge of their duties in this shop and we think that the deceased was at the time in the discharge of his duty as liner. These were all questions of fact to be determined by the jury under the conditions as they there existed and we are not able to say that the finding of the jury was manifestly against the weight of the evidence.

It is next insisted that the deceased was not in the exercise of due care for his own safety, and that being true there could be no liability upon the part of the defendant and that the Compensation Act of 1913 repealed the Compensation Act of 1911, and that by such repeal the common law defenses of contributory negligence, assumption of risk and negligence of a fellow servant were in force as at common law and that this principle was ignored throughout the trial and that the case was tried upon the theory that appellant was denied these defenses, except so far as the negligence of the deceased contributed to the injury, so far as it operated to mitigate the damages. We do not so understand the effect of the Compensation Act of 1913. While it is true that it does repeal the Act of 1911, yet Section 32 of the Act of 1913 provides that, "No right of action for damages at common law or under any other statute existing at the time of the taking effect of this Act shall be affected by this Act". And in addition to this, this right is preserved by Section 4 of Chapter 131 with reference to the construction of statutes. This also disposes of the criticism made by counsel for appellant upon the refusal and modification of its instructions 1, 2 and 3, as these instructions as presented ignore the rights of appellee under the Compensation law of 1911, and we think the court did right in the refusal

[illegible] the men to pass between the cross in the [illegible] of their duties in this [illegible] that [illegible] was at the time in the discharge of [illegible] duty. These were all questions of fact [illegible] under the conditions as they there existed [illegible] may that the finding of the jury [illegible] weight of the evidence.

It is more justified in a [illegible] case not in the exercise of the [illegible] time there could be no liability on the part of the defendant and that the [illegible] act [illegible] the [illegible] law defences of contributory negligence, [illegible] and negligence of a fellow servant were in [illegible] mon law and that this [illegible] total was that if the case was tried [illegible] that was denied these defences, [illegible] [illegible] operated [illegible] the attack [illegible] time that it [illegible] the act of [illegible] [illegible] time of [illegible] time act [illegible] by [illegible] tion or [illegible] by counsel [illegible] the instructions 1, 2 and 3, [illegible] refused ignore the liability [illegible] law of 1911, and we think [illegible]

of instruction 1, and modification of instructions 2 and 3 as was done. Instruction 4 given on behalf of the plaintiff is also criticised for the reason that it does not provide that the negligence of the defendant, if any was proven, so far as the same contributed to the injury, should be considered in reducing the amount of damages. It is true that this instruction omits to state that the contributory negligence of the deceased, if any, should be considered in reducing the amount of damages. This instruction, however, did not direct a verdict, and instruction 1 given on behalf of the plaintiff did provide, "but in the event the jury find from the evidence that his death was proximately caused by his own contributory negligence then they must consider such contributory negligence in reducing such amount of damages they will allow in event they do allow damages." These instructions must be considered as a series, and when so considered it appears to us that the jury was reasonably informed that such contributory negligence would go in the mitigation of any damages they might allow, and this doctrine and these instructions are fully sustained by the case of Crooks vs. Tazewell Coal Co., 203 Ill., 343.

It is further objected that some of plaintiff's instructions were given in the language of the statute. While this may not always be the proper thing to do yet it has been recognized frequently by our courts as not being reversible error, and we can not say that that is true in this case. Other criticisms are made upon instructions which we do not deem sufficiently important to require consideration.

It is also insisted that improper remarks were made by counsel for plaintiff in their argument to the jury.. This criticism cannot be considered for the reason that the remarks as made were not preserved in the bill of exceptions.

It is true they were included in the affidavit upon a motion for a new trial but this is not sufficient to bring them within the bill of exceptions. If counsel desire to preserve remarks they must be taken down and certified to by the Judge as having been made by counsel but in this case the only evidence preserved is by affidavit of the parties that such statements were made but this is not endorsed by the court in the bill of exceptions. This question has been fully settled in the case of Crown Coal & Tow Co. vs. Taylor, 184 Ill., 25[illegible]. C. & [illegible]. I. [illegible] Co. vs. Finnan, 84 App.,3a3.

After a careful consideration of this case we are unable to say that the verdict of the jury was manifestly against the weight of the evidence or that the court committed any reversible error in this proceeding and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

It is true they were admitted in the affidavit upon a motion for a new trial but this is not sufficient to bring them within the bill of exceptions. It command equity in presenting matters they must be taken [illegible] and entitled to by the judge on a writ [illegible] by counsel, but in this case the only evidence preserved is by [illegible] of the written that such statements were made but [illegible] by the court in the bill of exceptions. [illegible] can truly stated in the [illegible] Taylor, 164 [illegible]

[illegible]

unable to say that the [illegible] of [illegible] against the weight of the evidence [illegible] the court committed any reversible error in [illegible] the judgment of the lower court is affirmed.

[illegible]

Not to be reported in full.

Since the filing of the opinion in this case a petition for a rehearing has been presented, in which petition our attention is called to the case of The People vs. King 276 Ill. 138, in connection with the assignment of error touching the remarks alleged to have been made by counsel for appellee in their closing argument. We have examined this case and find that it is not applicable to this case for the reason that in this case the remarks alleged to have been made by appellee's counsel are not only not certified to by the trial judge, but are not even sworn to so that it can clearly be seen that it does not come within the reasoning of The People vs. King, supra.

The complaint made in the petition for a rehearing as to the giving of instruction No. 6 for appellee for the reason that it omitted the word "willful" is urged in the petition for rehearing for the first time, and was not presented in the brief and argument filed in this cause. It has been held both by the Supreme and Appellate Courts of this state that a new point cannot be made for the first time on a petition for rehearing, Gaines vs. Williams, 146 Ill. 450; Davis vs. Gibson, 70 Ill.App.273; Barthaler vs. Druiding & Kersten, 58 Ill.App.336.

The remaining points urged in the petition were fully considered by us in the preparation of the foregoing opinion.

Petition for rehearing denied.

Opinion modified by the Court June 22, 1918

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of* June *A. D. 1918*

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 80

Barney Childers,
Appellee

vs.

No. 13
October Term, 1917.

Chicago, Wilmington & Franklin
Coal Company,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. JULIUS C. KERN

Term No. 13. In the Appellate Court, Agenda No. 10

Fourth District.

October Term, A. D. 1917.

Barney Childers, Appellee.	
vs.	Appeal from Circuit Court of Franklin County.
Chicago, Wilmington & Franklin Coal Company, a Corporation. Appellant.	

McBride, J.

It is sought by this appeal to reverse a judgment of $475.00 recovered by the appellee against the appellant in the Franklin County Circuit Court.

It appears from the record in this case that on and prior to October 7, 1911, the appellant was engaged in the business of operating a coal mine in or near the village of Orient in Franklin County. That the mine consisted of a perpendicular shaft with the usual underground rooms, entries and roadways and employed therein a large number of men. The coal was hauled from the rooms to the uplifting shaft by means of a motor and the appellee was employed as a trip rider in said mine and upon the motor so used. On October 7, aforesaid there was a car loaded with coal in room No. 10 off the first stub entry off the main east entry off of the south entry to which the motorman and appellee as trip rider attached the motor for the purpose of hauling said loaded car to the hoisting shaft. It appears that before the motor was driven into said room No. 10, that the trip rider ran ahead and examined the room to see if there

were any danger marks or ~~[illegible]~~ signs of dangerous conditions existing in the room and found none. And then the motor was backed in to the room to hitch on to this car and as they were about to make the connection the trip rider was compelled to run around a timber that was set by the side of the track and used for the purpose of supporting the roof and, as he testifies, that just as he past around the timber a chunk of coal about three feet long and six inches thick fell upon him, struck him upon the head, left shoulder and eye and injured him. He was taken to the bottom by the motorman and cared for by a physician according to whose statements the appellee was not very much injured.

Counsel for appellant in its argument insists that the evidence in this case is not sufficient to warrant a verdict under either count of the declaration. It is stipulated that the appellant was not operating its shaft under the compensation act.

The first additional count of the declaration is a common law count and charges that on October 7, 1915, "It was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to perform his work but that defendant disregarded its duty in that respect and carelessly and negligently allowed room 10 aforesaid to be and remain in an unsafe and dangerous condition for the performance of the work which the plaintiff as a trip rider was then required to do, in that the defendant allowed and permitted a large amount of loose coal and rock to be and remain in the roof of room 10.....; and which was liable to fall upon and injure the employes of the defendant among whom was the plaintiff, while passing in and out of the room, which unsafe

were any danger marks or signals [illegible] [illegible]
lating in the room and [illegible] [illegible]
hooked in to the room to [illegible] [illegible] they
were about to make the connection [illegible]
nalled to run [illegible] [illegible]
the track and used for [illegible]
and, [illegible]
a chunk [illegible] coal about [illegible]
rail [illegible]
eye and injured [illegible]
motorman and crew for [illegible]
statements [illegible]

counsel for [illegible]

the evidence in this case [illegible]
verdict under either count of the [illegible]
stated that [illegible] the [illegible] it under
the circumstances [illegible]

[illegible]

and dangerous condition was well known by the defendant or by the exercise of due care and caution on its part could have been ascertained". The second additional count, after stating the general conditions as in the first count, alleges that a dangerous condition existed in the roof of said room within eight hours of the time before plaintiff entered the mine, in this, that said coal and slate were in a loose condition in the roof of said room and likely to fall upon and injure the plaintiff while in the performance of his duties and that the defendant wilfully failed to have its mine examiner inspect said room and observe whether there were any dangerous conditions in said room and wilfully failed as evidence of an examination of said room to inscribe on the walls thereof the month and day of the month of his visit, and wilfully failed to place a conspicuous mark at the place where the dangerous replace existed, and failed to observe that there was a dangerous condition in said room, and wilfully failed to make a record thereof and have the mine examiner take in to his possession the entrance check of the plaintiff, and wilfully failed by its mine examiner to submit to the mine manager any report indicating a dangerous condition in said room, and wilfully failed by its mine manager to with-hold the entrance check of the plaintiff and to instruct the plaintiff not to work in such place until such dangerous condition had been removed, as provided by statute.

It will be observed that in both counts of the declaration it is charged that a dangerous condition existed in the roof of room 1[illegible], in this, that the coal was loose and liable to fall. The only witness introduced on behalf of the appellee for the purpose of sustaining this declaration was the testimony of the appellee himself, who says that he

made an examination of room 1[illegible] that morning before making this trip for the purpose of ascertaining whether there were any marks there; said he was looking for [illegible] and then described how the marks would be made for [illegible] and other conditions, and then states that there were no danger marks inside of room 1[illegible]. He further testifies that a [illegible] that the motorman came on back and coupled on to a car load of coal in room 1[illegible] and that, "There was a timber to this side of the track that is to hold the top of the coal from falling and I could not get on the rear end of the car and I had to run around these timbers and the motorman of the cars was out ten feet ahead of me. I was going to catch the rear end and the slab of coal fell on me from the roof of the room, about twenty feet from the entry. It was about [illegible] feet long and six inches thick and I do not remember how wide it was. It struck me on the head, left shoulder and eye." While the appellee says that a slab of coal fell and struck him on the head yet he does not testify that this coal was loose or had any appearance of being loose prior to the time of the fall. The only evidence that we have been able to find in this record of a loose condition of the coal in the roof of this room prior to the accident was the fact of the accident itself and this is not sufficient to warrant a finding of appellant's negligence under the first additional count or a wilful failure to observe a dangerous condition under the second additional count. The mere proof of the accident or injury does not shift the burden of proof on the master and require him to show that the injury did not result from his negligence. Wabash Railroad Co. vs. Farrell -- 70 App.,566; Sack vs. Lolase et al, 137 Ill.129.

Under the duties as set out in the first additional count the master doesnot become an insurer that the place where he sets his men at work shall be absolutely safe. It is said by Justice Dibell in the case of Dougherty vs. Spring Valley Coal Company, decided by the Appellate Court of the Second District on February 1, 1917, that, "An employer does not become an insurer that the place where he sets his men to work shall be absolutely safe". From Hess vs. Rosenthal, 160 Ill.,621 to Monk Bros. Coal & Coke Co. vs. Thil, 228 Ill.,233 there are many cases where our Supreme Court followed the rule laid down in Cooley on xxx Torts and Wharton on Negligence as held that the duty which the employer owes to the employe in that respect is to exercise reasonable care to see that the place furnished for the servant to work in is reasonably safe. The appellee does not pretend in the testimony offered by him that a dangerous condition existed in the roof of this room other than the mere fact of the accident. It xxx does appear from the testimony of the mine examiner that he examined the roof with his rod and lantern at about three o'clock that morning and that no loose or dangerous condition existed at that time. The mine manager testifies that he was in the room about fifteen minutes after the accident and examined it and could see no place from which the coal had fallen and that there was no coal on the floor. Bartlett testifies that in the afternoon he examined the roof of the room and found it smooth and that there was no place in the roof from which slate, coal or rock had fallen. Peter Pike and Howard Price both testified that after the accident they examined the roof of the room and that there was no place in the roof from which coal, slate or rock had fallen, and they all agree that the roof

of the room was smooth and certainly if a block of coal three feet long and six inches thick had fallen out of the roof of this room they would have been able to have discovered it, and we must conclude not only that the plaintiff failed to show that a dangerous place existed before the accident but it has been abundantly shown by the appellee that no such condition did exist. The appellant certainly could not be charged with a wilful failure to ascertain that a dangerous condition existed unless there was something existing, some flaw or defect of some kind, that afterwards proved to have been dangerous. It is true as contended by appellee that if abnormal conditions existed that might or might not be dangerous, and they were or could have been observed by the mine examiner and afterwards proved to be dangerous that then a different rule would apply but this rule invoked by appellee would not in our judgment make the appellant liable where there was no appearance of a defect shown to have existed. Justice Dibell in the case of Daugherty vs. Spring Valley Coal Company, supra where a wilful failure to ascertain that a dangerous condition existed was charged further said in that opinion, "There is a substantial absence of any evidence that a dangerous condition existed there, except the fact, if it be a fact, that rock from the roof did fall. The condition of the roof of an entry is liable to constant change and the condition which resulted in the fall of the main entry, if rock from its roof did fall upon appellee, may have been produced long after the examination made during the preceeding night, we therefore conclude that the evidence does not support the

verdict and that the case must be tried again". Even conceding that appellee was injured in the manner he claims, we are of the opinion that the evidence wholly fails to show that a dangerous condition did exist in the roof of that room at the time of and prior to his alleged injury, and that the verdict and judgment is not supported by the evidence in this record, and the judgment of the lower Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

verdict and that the case must be tried again. Therefore, [illegible] appellee was ordered to be [illegible] [illegible] is of the opinion that the evidence [illegible] shows that a dangerous condition did exist in the road [illegible] at the time of and prior to the alleged injury, and that the verdict and judgment in all respects by the evidence in this record, and the judgment of the lower court is reversed and the cause remanded.

[illegible]

[illegible] to be recorded in [illegible].

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 11th *day of* March *A. D. 191*6

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Petition denied 5/22/18 4/1/16

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

211 I.A. 82

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Homer E. Bailey,
Plaintiff in Error

vs.

No. 14
October Term, 1917.

Mary Niebruegge, Executrix, etc.,
Defendant in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 14. In the Appellate Court, Agenda No. 48.

Fourth District.

October Term, A. D. 1917.

Homer A. Bailey, Plaintiff in error.	
vs.	Error to the Circuit Court of Madison County, Illinois.
Mary Niebruegge, executrix of the last will and testament of Herman Niebruegge, deceased, Defendant in error.	

McBride, J.

Upon a trial of this case in the Circuit Court judgment was rendered in favor of the defendant in error, hereinafter called defendant, against the plaintiff in error, hereinafter called plaintiff, for costs of suit.

Prior to June 15, 1913, the deceased, Herman Niebruegge had for several years been afflicted with a nervous trouble. He had been treated by the local physicians for several years and also a specialist from St. Louis had attended and prescribed for him but they were unable to cure him. A few days prior to June 15th a man by the name of C. Kellerman, who was a professor in one of the schools at Troy, Illinois, visited the defendant and told her and the family of some trouble with which he had been afflicted and that he had been treated by Doctor Bailey, the plaintiff, and had been cured and recommended that they secure the doctor's services for the deceased. This conversation occurred in the latter part of the week and on Sunday following the conversation Dr. Bailey and his son, Walter A. Bailey,

Term No. 14. In the Appellate Court,

Fourth District.

October Term, A. D. 1914.

Homer [illegible],
Defendant in error,

vs.

Harry Hall [illegible], executor of the last will and testament of [illegible] Hibbard, deceased,
Plaintiff in error.

Error to the Circuit Court of [illegible] County, [illegible].

Abstract.

[illegible]

who was also a physician, came out to the home of defendant at Troy, Illinois, and arrived there at about ten o'clock in the morning. He said he came by the direction of Kellerman for the purpose of seeing deceased but the defendant claims that she told him they had already expended a great amount of money in treatment and it had done no good and they did not care to expend any more money unless they were sure of a cure, and claims that she refused to allow him to treat the patient. She says that he told her he had heard a good deal about the patient from Professor Kellerman and asked if she would permit him to see the patient; she told him he could and he went in and examined the patient and claims he gave patient a treatment. His son, Mr. Walter Bailey, was with him at the time. After the treatment the two doctors and the defendant and her two daughters had a conversation while upon the porch at which time defendant claims that she told the doctor she did not care to expend any more money on deceased unless she was absolutely sure he could cure him and that Doctor Bailey assured them he could cure him and that he would do so in three weeks and possibly in two weeks but that they would have to send him to a hospital in St. Louis, and they also claim at that time the defendant asked the doctor what his charges would be and he said not to talk about money matters until after he had effected a cure, and that the charges then would be reasonable. This is denied by Doctor Bailey and his son, and it is claimed by them that the defendant requested him to come over to Troy and see thepatient, make arrangements to take him and treat him and that he was to do the best he could for him; that he gave no assurance whatever. Kellerman testifies

who was also a physician, came [illegible] defendant
at Troy, Illinois, and written [illegible] in the morning. He said he came by the direction of [illegible]
man for the purpose of seeing [illegible] defendant
claims that she told him they had already expended a great
amount of money in treatment and it was [illegible] and
they did not care to expend any more [illegible] sure it was cure, and claims that [illegible] to
treat the patient. She says [illegible] a good deal [illegible] and
claims it was about [illegible] to see the [illegible]
man he could not be well in and [illegible]
claims he gave patient a treatment. [illegible] rating, was with him at the time. [illegible]
two doctors and the defendant and the two doctors [illegible]
conversation while [illegible] at which time [illegible]
that [illegible] the doctor [illegible]
my wife money on account [illegible]
he could cure her [illegible]
cure [illegible]
[illegible]
patient in [illegible]
[illegible]
[illegible]
[illegible]
claimed by them that the defendant [illegible]
to Troy and see the patient. [illegible]
and tried him and he [illegible]
that he [illegible]

that he was authorized by the family to send Doctor Bailey over to see the deceased. This, however, is denied by the family. On the next day the deceased was taken to the Baptist hospital in St. Louis, Missouri, by the direction of Doctor Bailey and he then began the treatment of him and continued the treatments for five weeks. It appears from a preponderance of the evidence that the deceased gradually grew worse under the treatment and that he became very nervous, much more so than he had been, and was at times unable to recognize his friends. This is denied by the doctor and the nurse. At the expiration of five weeks the defendant wanted to take the deceased to his home but the doctor advised her that it would not be safe to move him in his present condition. She then caused her local physician to go over and examine the deceased and see if he was in a fit condition to be moved home, which was done, and the doctor advised his removal, which was made immediately. After the patient had been removed Doctor Bailey made another trip to Troy, Illinois, to see how deceased was getting along. It further appears that after the deceased was taken to his home he became some better and was able to go about but died on or about the month of September 1915. It further appears that a few days after this removal that the plaintiff sent the defendant a bill for $970.00 for treatment, which the defendant declined to pay. There was some effort made to compromise the matter but none effected, so the doctor then brought suit for the amount of his bill.

It further appears from the evidence that the plaintiff had no license to practice medicine in the State of Illinois.

It is contended by counsel for plaintiff that under the evidence in this case he is entitled to recover upon

that he was authorized by the family to permit Doctor Bailey over to see the deceased. [illegible], however, [illegible] by the family. On the next day the deceased was taken to the Baptist hospital in St. Louis, [illegible] Doctor Bailey and by [illegible] in charge of him and continued the treatments for [illegible] weeks. [illegible] from a preponderance of the evidence that [illegible] received gradually grew worse under the treatment [illegible] became very nervous, much more so than [illegible], and [illegible] able to recognize [illegible] friends. [illegible] tor and the nurses. [illegible] defendant wanted to take [illegible] necessary [illegible] the doctor advised [illegible] in his present condition. [illegible] to go over and examine the deceased [illegible] ill condition [illegible] for [illegible] nervous, [illegible] the [illegible] So [illegible] [illegible] life [illegible] died [illegible] appears that a few days [illegible] plaintiff sent the defendant a bill for [illegible] the defendant [illegible] to determine the [illegible] then brought [illegible]

[illegible] plaintiff and [illegible] the [illegible] of Illinois.

[illegible] the evidence in this case [illegible]

the merits and that the verdict of the jury is manifestly against the weight of the evidence. Also that the court erred in the giving of its instructions and in its rulings upon the admissibility of evidence.

As we view the case, the crucial question, and the one which will finally determine the issues involved, is as to whether or not the defendant had a contract with the plaintiff that he was to cure the deceased. The evidence upon this question was very conflicting, so much so that it was necessary, for a proper determination of the rights of the parties, that the jury be correctly instructed. If the jury had been correctly instructed we would not be disposed to disturb the verdict but as we view it one of the instructions given for defendant was erroneous, so much so, as to necessitate a reversal of the case.

The first instruction given by the court on behalf of the defendant was as follows, "The court instructs the jury that while the plaintiff has the right to testify in this suit in his own behalf the jury have the right in determining how much credit should be given to his testimony to take in to consideration the fact that he is the plaintiff and interested in the result of the suit". Owing to the fact that the testimony was so highly contradictory and that the witnesses for the defendant as well as the plaintiff were interested in the result of the suit, we think that this instruction was erroneous. It was calculated to impress the jury with the thought that the court entertained some special reason for discrediting the testimony of the plaintiff, which did not apply to the testimony of defendant. The instruction should have been of a character that made it

the merits and that the verdict of the jury is manifestly against the weight of the evidence. Also that the court erred in the giving of its instructions and in its rulings upon the admissibility of evidence.

As we view the case, the crucial question, and the one which will finally determine the issues involved, is as to whether or not the defendant dealt honestly with the plaintiff that he was to cure the [illegible]. The evidence upon this question was very conflicting, so much so that it was necessary, for a proper determination of the rights of the parties, that the jury be correctly instructed. If the jury had been correctly instructed we would not be disposed to disturb the verdict [illegible] the instructions given for defendant were [illegible], as to necessitate a reversal of the case.

The first instruction given by the court [illegible] of the defendant was as follows, "The court instructs the jury that while the plaintiff has the right to [illegible] this suit in [illegible] the jury [illegible] in determining how much credit [illegible] to his testimony to take in to consideration the [illegible] tiff and interested in [illegible] the fact that the testimony [illegible] that the witnesses [illegible] tiff were [illegible] that said instruction was [illegible] impress the jury with the [illegible] more careful [illegible] plaintiff, which did not [illegible] defendant. The instruction of said [illegible] it

applicable to the witnesses of plaintiff and defendant. An instruction similar to this one was condemned as erroneous in the case of Langster vs. March, 134 App.,24 . It is true that an instruction similar to this was sustained in the case of C. & . I. R. R. vs. Lusriége, 211 Ill.,5, but that was upon the ground that one of the parties to the suit was a corporation and the court says, "If, in the instruction now under consideration, the words, "the plaintiff" had been stricken out wherever they occurred and the words "a party" substituted, the instruction would have been entirely unobjectionable, and yet the jury would have known that it could apply to none except the plaintiff, for the reason that he is the only party to the suit who testified. Under such circumstances the fact that he was identified by the instruction did not justify itrefusal". The defendant testified in this case as well as the plaintiff and the same rule should have been applied to her testimony that was applied to the plaintiff.

It is also insisted by counsel for plaintiff that even if the evidence did show an agreement upon the part of the plaintiff to care the deceased before he was entitled to pay, that he was notwithstanding entitled to pay for the first trip that he made to see the deceased and before the deceased was sent to the hospital. If the defendant did not authorize the plaintiff to call and see the deceased or if the plaintiff was not permitted under the laws of Illinois to practice medicine in this State, then either of these propositions would defeat a recovery. The court, however, gave an instruction for the defendant that unless the plaintiff held a license issued under the State Board of Health

of Illinois authorizing him to practice medicine in the State of Illinois, that he could not recover for the services rendered. It is contended that this was error because the plaintiff was not engaged in general practice in Illinois but merely examined the patient and diagnosed his case for the purpose of determining what effect if any his removal to the hospital for final treatment would have upon him, and cites in support of this contention the case of Seigler vs. Ill.T.& S.Bank, 245 Ill., 48?. We do not regard this case as decisive of the question here involved. The decision there arose under a contract by which Seigler who was a practicing physician in Illinois had contracted with Mrs. Schicker in Illinois to go with her to California and wait upon her and care for her under a special contract. Our statute provides that, "No person shall hereafter begin the practicing of medicine or any of the branches thereof or midwifery in this state without first applying for and obtaining a license from the State Board of Health to do so". Sec. 2 of Chap.91, Revised Statutes. And later on, the legislature in defining what was meant by the practice of medicine says, "Any person shall be regarded as practicing medicine within the meaning of this act who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another". Sec. 7 of same chapter. The object of this statute was to prevent persons, who were not qualified, from practicing medicine upon the citizens of this state, and the statute is certainly broad enough to cover the visit made by Doctor Bailey for which he now seeks to recover a fee. The fact that he was seeking to collect a fee for a professional visit shows that he was engaged in the practice in Illinois.

of Illinois authorizing him to practice medicine in the State of Illinois, that he could not recover for the services rendered. It is contended that this is [illegible] because the plaintiff was not engaged in general practice of medicine but merely examined the patient and diagnosed his case for the purpose of determining [illegible] removal to the hospital [illegible] and often in [illegible] for [illegible] Ill.App. [illegible] is decisive of the question [illegible] decision quoted [illegible] under [illegible] practicing physician in Illinois [illegible] in Illinois [illegible] the practicing [illegible] or midwifery in this [illegible] obtaining a license [illegible] Sec. 2 [illegible] [illegible] true in [illegible] medicine [illegible] medicine [illegible] profession [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

It has been determined by the Supreme Court of this state that persons who practice the profession of osteopathy, a cure by means of manipulation, are within the terms of this Act and require a license. People vs. Gorman, 194 Ill.,16 . The plaintiff was certainly pretending to be able to cure the affliction of the deceased by his method of treatment and when he placed himself in that position it was necessary that he should possess a license to practice medicine under the laws of the State of Illinois. People vs. Dunn, 255 Ill.,289.

It is also insisted by counsel for plaintiff that the court erred in refusing to permit Walter Bailey to testify in the case. The Court refused this testimony because it appeared to it that Walter Bailey was interested in the suit. It was admitted upon an examination of this witness that the stationery and letter-heads and the bill rendered had at the head thereof the names of Doctor Homer . Bailey, Doctor Walter A. Bailey and Doctor Araminta Bailey, and that the bill was rendered, "Mr. Herman Niebruegge, Troy, Ill., to Doctors Bailey & Bailey, Dr. Osteopathic Physicians"; then follows a statement of the Bill. And the evidence also shows that Doctor Walter Bailey gave a portion of the treatments to the deceased, and while it is true Doctor Walter Bailey testified that he had no interest in the result of this suit yet the evidence and circumstances were such as to warrant the court in concluding that he did have an interest in it. Merely because Doctor Bailey stated that he had no interest in the result of the suit would not require the court to believe him if from the circumstances and the evidence before him he thought he was not stating the

It has been determined by the Supreme Court of this state that persons who practice the administration of osteopathy, a cure by means of manipulation, according to the tenets of that and kindred systems. [illegible]

[illegible]

facts correctly. A court is not bound to accept the testimony of a witness as true merely because there is no direct testimony contradicting it. If it contains such inherent improbabilities or contradictions as alone, or in connection with other circumstances in evidence, satisfy the of its falsity. Kocolski vs. Stone, 166 Ill., 66 . We are not able to say that the court erred in refusing to permit Doctor Bailey to testify but it does appear that the matters concerning which he was inquired about, except the treatement at the hospital and the condition of the patient while there, were all testified to by Walter Bailey later on in the case so we do not think there was any error committed in this ruling of the court.

Other errors have been assigned but we do not regard them as of such importance as to require further consideration, as we believe that the court did not materially err in the trial of this case, except as above stated.

We are of the opinion that the jury were not fairly instructed as to the credit to be given to the plaintiff by the jury and that the jury could infer from the instruction that the court had some specific reason why particular attention should be given to his interest in the case over that of the other witnesses. On account of the giving of the erroneous instruction above quoted we are of the opinion that the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* April *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Reinstated 6/22/5 4/1/15

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 91

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

John Hiller, Sr., Admr.,
Appellee

vs.

No. 19
March
~~October~~ Term, 1917.

Mt. Olive & Staunton Coal Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 19. In the Appellate Court, Agenda No.29.

Fourth District.

March Term, 1917.

John Miller, Sr., Administrator of Frederick Miller, deceased, Appellee.	Appeal from the Circuit Court of Madison County, Illinois.
vs.	
Mt. Olive & Staunton Coal Company, Appellant.	

McBride, J.

This appeal is prosecuted by appellant coal Company to reverse a judgment in favor of appellee rendered by the Circuit Court of Madison County.

The declaration consists of one count charging that appellee's intestate was employed as a driver in appellant's mine, hauling coal from the place where mined to the bottom of the shaft, and that appellant, "wilfully, wantonly and negligently permitted a dangerous defect to exist in the roof of the roadway over which intestate was required to pass as such driver in hauling coal to the bottom of the shaft, in that the roof and the cross-bar which supported the roof at that point, where said Frederick Miller was injured, was too low to permit the driver upon a loaded box to pass under it with reasonable safety, which fact was known to the defendant, or should have been known to it by the exercise of reasonable care". That intestate was killed by coming in contact with said cross-bar while hauling a loaded box of coal along said roadway.

Term No. 19. In the appellate Court, Agenda No.29.

Fourth District.

March Term, 1917.

John Miller, Jr., Administrator of Frederick Miller, deceased, Appellee.	Appeal from the Circuit Court of Jackson County, Illinois.
vs.	
Liverpool Stevedore Company, Appellant.	

Opinion, J.

This appeal is prosecuted by the Liverpool Stevedore Company to reverse a judgment in favor of the plaintiff rendered by the Circuit Court of Jackson County.

The declaration consists of one count, alleging that appellee's intestate was employed as a driver in appellant's line, hauling coal from the dock to the bottom of the shaft, and that while so doing, plaintiff, carelessly and negligently drove his team of horses across the track in the roof of the roadway over which tracks it was usual for the men and drivers in hauling coal to run their cars to the shaft, in such the track was not covered or guarded, and that at that point, there was a hole [illegible] too low to permit the driver from [illegible] it with reasonable safety, [illegible] plaintiff, or should have been [illegible] reasonable care". [illegible] in contact with exposed electric wire [illegible] coal along said roadway.

The evidence discloses that the roadway in question runs in a southerly direction from the parting where loaded boxes were left. It was intestate's duty to take empty cars from this parting south to the place where coal was being mined and to bring the loaded boxes back north to the parting. There were no eye witnesses to the injury which resulted in his death. The evidence shows that appellee's intestate was coming north with two loaded boxes of coal. Another driver who was some distance north of him heard him call "whoa" to his mule and came down to where he was to see what was the matter. He found intestate under the front car dead and the mule standing unhitched from the car a few feet further north. There was evidence tending to show that the body had been dragged along the track for some feet but the evidence, however, was contradictory as to the distance. About twenty or twenty-five feet south of where the body was found three iron bars had been placed against the roof as supports, extending across the tracks and supported by posts on each side of the roadway. These bars had been placed there some four or five years prior to the injury. In this roadway the roof had a general clearance of about six feet but at the place where the bars were placed it was somewhat lower, there being a clearance of about five feet and six inches between the top surface of the track and the bottom surface of the cross-bars.

Appellee's theory of the case is that the deceased met his death by striking his head on the rail or bar supporting the roof or that he was knocked from his seat by so striking his head and was thrown under the car. This theory is supported by circumstantial evidence of finding a few hairs on the cross-bar which witnesses for appellee testified

The evidence discloses that the [illegible] in question was in a southerly direction from the [illegible] where [illegible] were left. It was intoxicated only to [illegible] while [illegible] and to bring the [illegible] there were no eye witnesses to the injury [illegible] in his death. The evidence [illegible] was coming north [illegible] drive two [illegible] "wide" to the east [illegible] was the matter. [illegible] died and the [illegible] left [illegible] that the body [illegible] but the evidence [illegible] [illegible] body was [illegible] not [illegible] the by [illegible] injury. [illegible] about [illegible] it [illegible] [illegible] and [illegible] [illegible] striking [illegible] [illegible] [illegible] [illegible]

were like the hair of deceased, and from finding a bruised place on the side of the head of the deceased, and as the evidence of appellee tended to show that the body had been dragged from near the cross-bars to where it was lying when found.

Counsel agree that the declaration in this case charges an action for negligence at common law.

The appellant has assigned many errors but the only ones argued are that the declaration did not state a cause of action nor did the evidence prove a case of negligence against appellant and that the court erred in not directing a verdict for the defendant, and in not sustaining its motion in arrest of judgment. This presents for our determination the single question as to whether or not the facts disclosed by the record are sufficient to warrant the jury in finding that the defendant was guilty of negligence in failing to furnish the deceased with a reasonably safe place in which to perform his work. The evidence is certainly sufficient to sustain the jury in finding that the deceased came to his death by his head having come in contact with the cross bar in the roof while he was engaged in driving a mule attached to a pit car loaded with coal which was then being hauled to a parting in the mine.

The appellant had elected not to operate its mine under the compensation act and no question of that character, or contributory negligence or assumption of risk can arise.

It is the contention of appellant that as these iron bars were placed there to prevent the roof from falling and that as it was shown to have been done in a workmen like

were like the hair of deceased, and from finding a crushed place on the side of the head of the deceased, and on the evidence of appellee tended to show that the body, in being dragged from near the cross-fire to where it was lying when found.

Counsel argue that the instruction in this case charges on motion for new trial, and of course that

[illegible]

only once argued and that [illegible] it is not error a cause of action nor has the evidence [illegible] a case of negligence against appellant and that the court [illegible] rectly a verdict for the defendant, and [illegible] motion in arrest of judgment. This [illegible] for the determination the single question [illegible] not the facts [illegible] closed by the record [illegible] the jury in finding [illegible] in failing to [illegible] place in which to [illegible] work. [illegible] sufficient to [illegible] deceased came to [illegible] that with the crane [illegible] arriving, [illegible] was then [illegible] rule.

[illegible] under the [illegible] law, [illegible] rule.

[illegible] iron bars [illegible] and that [illegible] and that he [illegible] like

manner, that as a matter of law it could not constitute a dangerous defect. Much reliance is placed by counsel for appellant upon the case of Jacobs vs. Madison Coal Corporation, 165 Ill. App.,444. In fact this is the only case cited in their brief. We do not regard this case as susceptible of the construction sought to be given to it by counsel. The declaration in that case charges that on account of a bad roof a number of cross-bars had been placed in the roof of the entry to support it and that a number of cross-bars had become broken and sagged and constituted a dangerous condition under the mining statute and that defendant willfully permitted plaintiff to enter the mine before such dangerous condition had been removed. The court in determining that case held that, "No such liability as that alleged in the declaration existed by statute and the declaration did not aver a cause of action". The court then, after having reached this conclusion, and after having determined that the case would have to be reversed, proceeded to discuss other errors and in the discussion decided that the deceased did not come to his death by coming in contact with the cross-bars. It is true at the conclusion the court says, "It is not a dangerous condition within the meaning of the statute to have a low entry or an entry lower at one point than another". We regard this language as being applicable to entries in general, but that the language used did not apply to an abrupt drop in the roof where the remainder of it was smooth and level. The case of Jones & Adams Co. vs. George, 227 Ill., 64, was a common law action for injuries received by reason of a sagging roof in the entry, and the action was sustained. So that if it be conceded as determined by the Jacobs case that an action for a

manner, that as a matter of law it could not constitute a dangerous defect. Such reliance is placed by counsel for appellant upon the case of [illegible] v. [illegible] Corporation, 168 III. App. 444. In that case [illegible] cited in their brief. We do not [illegible] of the construction sought to be [illegible] in it by counsel. The declaration in that case [illegible] that on account of a bad roof a number of cross-[illegible] had been placed in the roof of the entry to support it and that a number of cross-bars had become broken and rotted and constituted dangerous condition under the ordinary [illegible] that [illegible] fully warned plaintiff [illegible] such dangerous condition had been [illegible] stating that the case said that, [illegible] judge [illegible] in the declaration did not aver a cause of action. [illegible] having reached the cross-bars, and that [illegible] that the cross-bars were [illegible] defective, [illegible] other errors and in the [illegible] that the discovered did not [illegible] with the cross-bars. [illegible] case, it is not a dangerous [illegible] of the [illegible] to have a [illegible] and [illegible] plaintiff to be entitled [illegible] did not [illegible] on account [illegible] [illegible] damage [illegible] for injuries received by [illegible] in [illegible] entry, and the action was [illegible] decided as determined by the [illegible] that [illegible]

sagged roof was not within the terms of the mining law, the Jones & Adams case in commenting upon the facts with reference to appellee's negligence says, "It is to be noted that the entry was dark, and that the only way anything could be seen in it was by means of artificial lights". While this cause was reversed for errors in the admission of testimony the whole case when read clearly shows that the questions of negligence and assumed risk were matters to be determined by the jury under all of the facts and circumstances proven in the case. The evidence in the case now under consideration tends to show that the entry at the place of the injury was dark and no way of observing these cross-bars except by the a light carried in the cap of deceased, which gave but little light, and the cross-bars could not be seen until deceased was right at them; the nearest light was in the parting ninety feet or more away; the roof was level up to this abrupt set-off; no light by which it could be seen, nothing to warn a trip rider of the approach to this obstruction. It seems to us that unless the trip rider noted the place of this obstruction and kept it in mind that he was liable to be struck by the cross-bars at any time. The appellant knew the height of the entry, the distance between the seat on the car and the cross-bars, that the entry was dark, and knew or should have known that appellee would be liable to be injured while passing under these bars, and knowing this should have provided some means by which the driver could see or know when he was approaching the cross-bars. The appellant failed to provide anything or any means by which these cross-bars could be located in the making of a trip. While it does appear that deceased was found several feet from the cross-bar, it is shown that he and other riders were in the habit of riding sideways upon their

engaged root was not within the terms of the winding [illegible]. The
Jones & Adams case in commenting upon the jurors with reference to employee's negligence says, [illegible] that
the entry was dark, and that the duty by [illegible] could be
seen if it was by means of artificial lighting. [illegible] that
cause was reversed for error in the [illegible] testimony.
The whole case then and clearly shows that the matter of
negligence and assumed risk was for [illegible] to be determined by
the jury under all of the [illegible] circumstances even in
the case. The evidence in the case was [illegible] to indicate
tends to show that the entry [illegible] of the injury was
dark and no way of observing [illegible] by the
a light carried in the car of [illegible], which [illegible] little
light, and the cross-[illegible] was not [illegible] was
right at that; the nearest light was [illegible] ninety feet
or more away; the road was level [illegible]
no light by which it could be seen, [illegible]
rider of the approach to this [illegible]
unless the train [illegible] the [illegible] and
kept it in mind that he was [illegible]
[illegible] at any time. The [illegible]
the distance between the [illegible]
that the entry was dark, [illegible]
negligence would be [illegible]
there here, and leaving the [illegible]
by reason the driver could [illegible]
the cross-[illegible]. The [illegible]
any event by which that [illegible]
making of a turn. [illegible]
round seven feet from the cross-[illegible]
other ridges were in the [illegible]

seats, that the seat was three feet from the bars of the roof, that deceased had a bruise upon the side of his head, and hair of color of his was found upon the cross-bar, and that there was evidence tending to show he had been struck very near the cross-bar. When all of these facts and circumstances are considered it cannot, in our judgment, be said that the verdict of the jury was manifestly against the weight of the evidence.

We do not believe that under the existing conditions that it could be said as a matter of law that the place was reasonably safe. "Whether appellant was guilty of negligence of the deceased of contributory negligence were questions of fact for the jury". C. & A. vs. Eaton, 194 Ill., 444. It was for the jury to determine if the obstruction was of sufficient height to permit the trip riders to pass under in safety, or that suitable means had been provided to determine when these cross-bars were being approached. In commenting upon the question as to whether a railroad bridge was constructed of sufficient height for safety to the brakemen, the Supreme Court said, "The real question for the jury was, whether the bridge, as constructed, was safe, and not dangerous. It might be lower than other bridges and at the same time be safe. If the bridge, as constructed, was of sufficient height so that brakemen on the top of the car might cross over the bridge in safety, then it made no difference whether it was higher or lower than other bridges." C. .C.& St.L.Ry.Co. vs. Walter, 147 Ill., 64. We are of the opinion that the question as to whether or not the place was reasonable safe for the deceased in performing his work was a question of fact for the

[illegible] that the debt was turned [illegible] from the [illegible] of the roof, that deceased had a bundle upon his [illegible] of his [illegible], and hair of color of his was [illegible] the cross-bar, and that there was evidence tending to show [illegible] attack very near the cross-bar. [illegible] all of these and circumstances are considered it seems, in our judgment, he said that the verdict of the jury was [illegible] the weight of the evidence.

We do not believe that under the circumstances [illegible] tions that it could be said [illegible] that the place was reasonable safe. [illegible] of negligence of the deceased [illegible] were questions of fact for the jury. [illegible] 164-111, 444. It was for the jury to determine [illegible] opportunity was in violation [illegible] right to [illegible] riders to pass [illegible] very, [illegible] been provided to determine [illegible] negligence. In considering [illegible] a railroad [illegible] was constructed [illegible] safety to the traveler, the [illegible] question for the jury [illegible] bad, low [illegible], and not dangerous. It [illegible] other bridges and [illegible] construction, was [illegible] the top of the car [illegible] than it made [illegible] than other bridges. [illegible] 147 111, 64. [illegible] whether or not the [illegible] ceased in [illegible] the [illegible] for the

jury and not of law for the court, and we are unable to say that the verdict of the jury is manifestly against the weight of the evidence, and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

jury and not of law for the court, nor is it unable to say that the verdict of the jury is manifestly against the weight of the evidence, and the judgment of the trial court must be affirmed.

IT IS SO ORDERED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th *day of* April *A. D. 191*[illegible]

Clerk of the Appellate Court.

NOINI

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

211 I.A. 99

Continental Portland Cement Co.,
Appellant

vs.

No. 33
October Term, 1917.

John W. Koch et al,
Appellees

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 33. In the Appellate Court, Agenda No.27.

Fourth District.

October Term, A. D. 1917.

Continental Portland Cement Company, Appellant. vs. John W. Koch, George E. Foster, Henrietta M. E. Koch, Marie C. Joesting, Alton Savings Bank and Citizens National Bank, Appellee	Appeal from the Circuit Court of Madison County.

McBride, J.

The appellant filed a bill in chancery to set aside an alleged transfer of real estate and 430 shares of the capital stock in the Stoneware Pipe Company alleged to have been made by John W. Koch to his wife in fraud of his creditors. Upon a hearing of the case it was decreed that the alleged conveyance of real estate and transfer of personal property were made in good faith, and the court denied relief to the appellant as to these matters.

It appears from the record in this case that about the month of March 1912 John W. Koch was the owner of 430 shares of capital stock of the Stoneware Pipe Company, and at about that time he made a gift of and transferred the said shares of stock to his wife, Henrietta Koch, and endorsed and delivered the certificate to her. The evidence further tends to show that at that time John W. Koch was solvent and that the shares were transferred and given to his wife in lieu of making a will which he had promised her he would do.

Term No. 33. In the Appellate Court, Agenda No.27.

Fourth District.

October Term, A. D. 1917.

Continental Portland Cement Company,
Appellant.

vs.

John H. Scott, George W. Porter, Henrietta M. H. Koch, Marie H. Doerfling, Hilton Strong Bank and Citizens National Bank,
Appellees.

Appeal from the Circuit Court of Madison County.

Morris, J.

The complainant filed a bill in chancery to set aside an alleged transfer of real estate and 37 shares of the capital stock in the Citizens National Bank alleged to have been made by John H. Koch to his wife in fraud of his creditors. Upon a hearing of the case it was decreed that the alleged conveyance of real estate and transfer of personal property were null and void, and the court granted relief to the complainant as to these matters.

It appears from the evidence in the case that on the month of March 1913 John H. Koch was the owner of 37 shares of capital stock of the Citizens National Bank, and at about that time he made a trip to Europe, leaving the said shares of stock in his safe, which was locked and deposited in a certain vault. The evidence further tends to show that at that time he was insolvent and that the shares were transferred to, and in his wife in lieu of money which he borrowed and her he would do.

It further appears from the record that on March 10, 1914, John W. Koch became indebted to appellant to the amount of $3155.46 and on that date signed a note, due ninety days after date, as surety for the Builders Supply & Coal Company to appellant. That on May 15, 1914, he executed as surety aforesaid another note to appellant for $4500.00, due sixty days after date. It further appears that these notes were signed by both George L. Foster and John W. Koch, and that they were both stock holders in the Builders Supply & Coal Company. That the makers of said notes failed to pay the same when they became due and the appellant obtained judgment against the makers for $7875.42, being the amount of the two notes above referred to. Execution was issued and returned "no property found".

It further appears from the evidence that John W. Koch was the owner of lots three and four, block twenty-nine of the City of Alton, of the value of seven to eight thousand dollars. That on the 13th day of July, 1914, he sold and conveyed the said real estate to his wife Henrietta M. Koch for an expressed consideration of one dollar but in fact for the consideration of one hundred shares of the capital stock of the Continental Portland Cement Company, being one hundred shares of the four hundred thirty shares that he had given to her in 1912, and valued at seven thousand dollars. Later on he borrowed five thousand dollars from the Alton Banking & Trust Company and secured the same by the one hundred shares of capital stock of the Stoneware Pipe Company and five thousand dollars worth of stock of the Chicago Lumber & Coal Company.

It further appears from the evidence that in 1911 Koch and Foster were owing the Alton Savings Bank five hundred

It further appears from the record that on March 1[illegible], 1914, John [illegible]. Koch became indebted to appellant to the amount of $2[illegible].48 and on that d[illegible] the signed a note, due nine[illegible] days after date, as surety for the [illegible] Coal Company to appellant. That on May [illegible], 1914, he executed as surety aforesaid another note to appellant for $[illegible], due sixty days after date. It further appears that these notes were signed by both [illegible] and John [illegible]. Koch, and that they were both [illegible] in [illegible] evidence [illegible] Coal Company. [illegible] failed to pay the same when they became due and the appellant obtained judgment against the makers for $[illegible], being the amount of the two notes [illegible] mentioned. [illegible] was issued and returned "no property found".

It further appears from the evidence that John [illegible] Koch was the owner of [illegible] the [illegible], Koch seventy-nine of the City of [illegible], of the value of seven [illegible] and dolls [illegible]. That on the [illegible] day of [illegible], 1914, he sold and conveyed the said [illegible] to [illegible] Koch for an expressed consideration of [illegible] but in fact for the [illegible] of [illegible] of the capital stock of the [illegible] Company, being one hundred shares of [illegible] company, that is [illegible] to [illegible], and [illegible] seven [illegible] and dolls [illegible]. That [illegible] from the [illegible] by the one hundred shares of capital stock of the [illegible] Coal Company and the [illegible] of the [illegible] of the Chicago [illegible] Company.

It further appears from the evidence that in July Koch and Loeber were [illegible] the [illegible] of five hundred

dollars, and that later on, some time in 1913 or '14, they borrowed several amounts of money from this bank, making a total of $7,500.00 for which a note was given, and to assist in securing this note Henrietta Koch loaned John W. Koch sixty shares of the capital stock of the Stoneware Pipe Company that was owned by her. The evidence further shows that the money procured by these several loans was used by Koch and Foster in the payment of the indebtedness for which they were liable.

It further appears from the evidence that Henrietta Koch was the owner of an insurance policy and that she disposed of this policy for about $2500.00 and borrowed three thousand dollars from her sister and with this purchased from the Alton Banking & Trust Company the note of five ~~hun~~ thousand dollars, with the collateral security, being the one hundred shares of stock of the Stoneware Pipe Company, andother stock, and she claims that this was turned over to her by the bank and that she is the owner of this note with the collateral security.

The bill in this case alleges, in substance, that John W. Koch was in fact the owner of the real estate above described and of the shares of capital stock referred to, and that he transferred the same to his wife, Henrietta M. Koch, for the purpose of defrauding his creditors, and seeks the discovery of that and other property which the bill alleges is concealed by them from the creditors of Koch, and asks that all such transfers be set aside as fraudulent and be subjected to the payment of appellant's judgment. The answer admits that the stock was transferred by John Koch to Henrietta M. Koch, as a gift, in the year of 1912, and

dollars, and that later on, some time in 1913 or '14, they borrowed several amounts of money from this bank, making a total of $7,500.00 for which a note was given. And as security in securing this note Henrietta Koch [illegible] John Koch sixty shares of the capital stock of the [illegible] Fire Company that are owned by them. The evidence further shows that the money borrowed by them on this loan was used by Koch and Fischer in the payment of the indebtedness for which they were liable.

It further appears from the evidence that Henrietta Koch was the owner of an [illegible] realty that she [illegible] disposed of [illegible] [illegible] realty [illegible] five [illegible] thousand dollars [illegible] real estate [illegible] purchased [illegible] Fire [illegible] five thousand dollars, with the [illegible] being the one [illegible] of the company, and other stock, and [illegible] over to [illegible] by the bank and that [illegible] with the [illegible].

[illegible] in [illegible] that [illegible] John [illegible] [illegible] the [illegible] [illegible] and [illegible] the [illegible] [illegible] and [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] and [illegible] [illegible] and [illegible] [illegible] the [illegible] [illegible]. The [illegible] [illegible] the [illegible] Koch [illegible] [illegible] and

before any indebtedness had been incurred; also admits that he sold and conveyed the real estate above described to her but claims that she paid therefor a valuable consideration, and denies any fraudulent intent in the making of the several transfers.

Many errors have been assigned by counsel but the only ones argued by him are, that the gift of the four hundred thirty shares of stock was fraudulent and void and made for the purpose of hindering and delaying creditors, and that the conveyances of the real estate was without consideration and fraudulent as to the creditors of John W. Koch.

Upon an examination of this record we believe that a determination of this case depends upon the validity of the gift of John W. Koch to his wife Henrietta Koch of the four hundred thirty shares of the capital stock of the Stoneware Pipe Company. If the gift was valid then Henrietta Koch had the right to do as she chose with the shares of stock so obtained by her. If the gift was invalid then all of the rights that she claims to have acquired by such gift would not avail her anything as against the creditors of John W. Koch. It appears from this evidence that John W. Koch transferred and delivered 430 shares of stock aforesaid to Henrietta Koch in the early part of the year 1912, and at that time he was not indebted to exceed five hundred dollars and had abundant property wherewith to pay such indebtedness. This is not disputed. The only witnesses upon this question were John W. Koch and Henrietta Koch, both of whom say that this whole transaction was in good faith and for the purpose of preserving for her something out of their prosperity. It is said by counsel for appellant that because he used Koch

before any indebtedness had been incurred; also admits that he sold and conveyed the real estate above described to her but claims that she paid therefor a valuable consideration, and denies any fraudulent intent in the making of the several transfers.

Many errors have been assigned by counsel but the only ones argued by him are, that the gift of the four hundred thirty shares of stock was fraudulent and void and made for the purpose of hindering and delaying creditors, and that the conveyance of the real estate was without consideration and fraudulent as to the creditors of John A. Koch.

Upon an examination of this record we believe that a determination of this case depends upon the validity of the gift of John A. Koch to his wife Henrietta Koch of the four hundred thirty shares of [illegible] stock of the [illegible] Company. If the gift was valid then Henrietta Koch had the right to [illegible] the shares with the [illegible] stock so obtained by her. If the gift was invalid then all of the rights that she claims to have acquired by such gift would not avail her anything as against the creditors of John A. Koch. It appears from the evidence that John A. Koch transferred and delivered 430 shares of stock to [illegible] Henrietta Koch in the early part of the year [illegible], and at that time he was not indebted to [illegible] and had abundant property wherewith to pay [illegible] debts. This is not disputed. The only [illegible] upon this question were John A. Koch and Henrietta Koch, [illegible] this whole transaction was [illegible] good faith and [illegible] purpose of preserving for her [illegible]. It is said by counsel for appellant that [illegible]

and his wife as witnesses that he would not be bound by their conclusions, which is true, but such facts as they stated and are not disputed would have to be taken and accepted by the court as true, and the matter of indebtedness probably owing by him at the time the transfer was made would be facts which, if not disputed, would have to be considered by the court in determining the questions involved in this suit. If it be true that John W. Koch was not indebted at that time or had ample property to pay what little indebtedness did exist, then he had, under the law, a perfect right to make a gift of anything owned by him to his wife and unless this gift should be made in anticipation of committing a fraud upon creditors it would be binding. It is unreasonable to suppose that they had in their mind at that time the committing of a fraud upon the appellant as appellant's debt was only as security and not contracted for more than two years after the transfer of this stock. It is very clear that at the time of the transfer of this stock that appellant was not a creditor of Koch. A husband may create a separate estate for his wife out of his own property if there are no creditors of the husband at the time whose rights would be put in jeopardy, and if there are such creditors if he retains a sufficient amount to liquidate itx is lawful. "It has never been held, to our knowledge, that a subsequent creditor can inquire into the fairness of the transaction, even if the conveyances to the wife be regarded as voluntary conveyances without actual consideration, for the sole purpose of creating a separate estate in the wife.... The law not only sanctions such a course, but in many instances it is nothing more than simple justice to the wife....

and his wife as witnesses that he would not be bound by their conclusions, which is true, but such facts as they stated and are not disputed would have to be taken and accepted by the court as true, and the matter of indebtedness probably owing by him at the time the transfer was made would be facts which, if not disputed, would have to be considered by the court in determining the question involved in this suit. If it be true that Jack was not indebted at that time or had some property to pay what little indebtedness did exist, then he, under the law, a perfect right to make a gift of anything owned by him to his wife and unless this gift would be in anticipation of committing a fraud upon creditors it would [illegible] binding. It is unnecessary to suppose that they [illegible] in their mind at that time the committing of a fraud upon [illegible] creditors an appellant's debt was only an equity and not recognized for more than two years after the [illegible] of this work. It is very clear that at the time of the transfer of this work that appellant was not a creditor of the [illegible] to be by create a debt in favor of his own property if there are circumstances of the [illegible] rights would be [illegible] property, [illegible] conditions it is [illegible] a sufficient [illegible] is lawful. [illegible] that a subsequent creditor can [illegible] of the transaction, even if the conveyance [illegible] fraudulent as against a conveyance without [illegible] the sole purpose of cheating [illegible] the law not only [illegible] attempts it is nothing [illegible] from the wife...

But it is the doctrine of this court that only creditors having claims when the fraud is committed can avoid such conveyances, unless it be shown the deed was made in anticipation of incurring debts to avoid the payment of which the conveyance was made". Eckhart vs. Burrell Manf. Co., 236 Ill., 134. And this doctrine has been announced by the Supreme Court in the cases of Bridgford vs. Riddell, 55 Ill., 261; Tunison vs. Chamblin, 88 Ill., 378; Crawford vs. Logan, 97 Ill., 396; Hames vs. Dorsett, 147 Ill., 54 . It can not be said from the record in this case that the stock was transferred to Henrietta Koch in anticipation of incurring the indebtedness of appellant as this indebtedness was not incurred for two years afterwards, and it was only a security debt for the Builders Supply & Coal Company. We are of the opinion that under the facts in this case John W. Koch had a perfect right to give this stock to his wife at the time that he did. If it be true that he had the right to give this stock to his wife then she was authorized to use such stock for the purpose of purchasing the real estate in question, if she desired so to do. It appears from the evidence that she did sell and transfer to John W. Koch one hundred shares of this stock for the real estate in question, which she had the right to do. It further appears that with her own means she purchased from the bank the note for which the stock had been assigned as collateral security and holds this indebtedness and stock against her husband, and we can see no reason why under the conditions she should not do this, and that she would be entitled to the payment of this note first out of this stock, and the rights of the appellant are protected in the decree as it is given the right to

But it is the doctrine of this court that only creditors having claims when the trust is committed can avoid such conveyances, unless it be shown the deed was made in anticipation of incurring debts to avoid the payment of which the conveyance was made. Kennedy vs. Worrell [illegible], vs. 258 Ill., 134. And this doctrine has been announced by the Supreme Court in the cases of [illegible] vs. [illegible], [illegible] Ill.; Smith vs. Thomas, [illegible] Ill., [illegible] vs. [illegible], 97 Ill., [illegible]. [illegible] to said from the record in this case [illegible] was transferred to [illegible] in violation of [illegible] the indebtedness of [illegible] was not incurred for [illegible], and is [illegible] debt for the [illegible] opinion [illegible] a perfect right to give [illegible] to his wife [illegible] that he did. [illegible] stock [illegible] to live [illegible] stock [illegible] tion, [illegible] the indebtedness [illegible] shares of [illegible] and he had no right to [illegible] own [illegible] stock had been [illegible] their indebtedness and [illegible] we can see no reason [illegible] this, and [illegible] more than [illegible] are proceeded in the [illegible] right to

redeem this stock.

This disposes of the only questions argued by counsel for appellant, and, as we think, fully determines the rights of the parties herein.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Not to be reported in full.

redeem this stock.

This disposes of the only questions argued by counsel for appellant, and, we think, fully determines the rights of the parties hereto.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th *day of* August *A. D. 1918*

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

211 I.A. 167

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Town of Grand Prairie,
Appellee

vs.

No. 43
October Term, 1917.

C. E. Schneider,
Appellant

~~ERROR TO~~
APPEAL FROM

County COURT

Jefferson COUNTY

TRIAL JUDGE

HON. ROBERT E. HICKMAN

Term No. 43. In the Appellate Court, Agenda No.20.

Fourth District.

October Term A. D. 1917.

Town of Grand Prairie, Appellee.	
vs.	Appeal from the Jefferson County Court.
C. F. Schneider, Appellant.	

McBride, J.

The appellee recovered a judgment in the court below for five dollars and costs as a penalty for the obstructing of an alleged highway in said county. A judgment was rendered in this suit against the appellant at a former term of the Jefferson County Court from which judgment the appellant prosecuted an appeal to the March Term 1916 of this court. Upon a hearing of said cause it was determined by this court that the highway charged to have been obstructed was an "old trail that ran across vacant and unoccupied grounds which had not been fenced. That such trail had been abandoned by the public and two other roads across the land had been used from time to time in place of the same. That there had in fact been no established line of travel across the land in question but that the trail or traveled way had been shifted from place to place at different times. From an examination of the record we have concluded that the attorneys failed to show that the public had acquired a right of way by prescription at the place along the line where appellee claims the old trail was located across the land in question". The cause was reversed by this court because the lower court refused to permit the appellant to prove that certain roads east of the trail had been traveled for the

Term No. 45. In the Appellate Court, Agenda No.5.

Fourth District.

October Term A. D. 1917.

Town of Grand Prairie, Appellee,	
vs.	Appeal from the Jefferson County Court.
C. E. Schneider, Appellant.	

Lorigan, J.

The appellee recovered a judgment in the court below for ten dollars and costs in a penalty for the obstructing of an alleged alley in said county. Judgment was rendered in the trial against the appellant, a former term of the Jefferson County court, from which in great the appellant prosecuted an appeal to the Fourth Appellate Court of this court. Upon a hearing, of course it was determined by this court that the judgment should be reversed, as a dedicated way on which trail that a portion of the proposed ground, which has not been fenced. The road trail had been abandoned by the public, as the trial court found, and had been used from time to time in the same, that there and in fact been no continuous line of travel over the line in question, but that the trail or travelled way had been altered in a few places to avoid difficult ground. From an examination of the record we find that the appellee failed to prove that the public had a right of way by prescription in the line claimed, and the judgment claims the old trail was lost and never the road in question". The case was reversed by the first Appellate Court. The lower court refused to permit the appellant to prove that certain roads were in the trail and been travelled for the

last six or seven years by the general public and that the old trail had been abandoned and grown up in brush, trees and ditches so that it had become impassable for five or six years, and that there were no obstructions on the old trail. The appellate court reversed the county court at the former hearing and remanded the cause for a new trial. The cause was again heard and judgment again rendered against the appellant for five dollars and costs, to reverse which this appeal is prosecuted.

The evidence introduced by plaintiff in the trial below is substantially the same as that introduced upon the former trial, and in the former opinion rendered by this court it was stated, that, "For many years, as shown by the proofs, there has been a road running diagonally across Section 23 in the town of Grand Prairie, in said county, starting at the north east corner and running to a point near the middle of the south line of the south west quarter. The section was heavily timbered and the road in question was simply a ~~trail~~ trail through the woods, no part of it having been laid out. A few years ago the road was changed by petition as to the north east quarter so that it ran along the entire east line and thence west half way along the south line of said quarter section. It was also changed by agreement as to the south end so that it ran along the south line of the section to the south west corner of the south east quarter thereof, and thence north on the quarter section line an eighth of a mile from where the road took the direction of the old trail northeasterly across the north sixty acres of the west half of said south east quarter of said Section 23, and connected with the road laid out by petition as aforesaid

last six or seven years by the general public and that the old trail has been abandoned and grown up in brush, trees and ditches so that it had become impassable for five or six years, and that there were no alternatives to the old trail. The appellate court reversed the county court of the former hearing and remanded the case for a new trial. The cause was again tried and judgment in favor of plaintiff the appellant for five acres and costs. To reverse which this appeal is prosecuted.

The evidence introduced by plaintiff in the trial below is substantially the same as that introduced upon the former trial, and in the former opinion rendered by this court it was recited, that, "The only [illegible] by the proofs, there has been a road run in different [illegible] section 28 in the town of Grand Prairie, in said county, starting at the north east corner of the section to a point near the middle of the south line of the south west quarter, the section was partially fenced [illegible] a [illegible] time it was being used [illegible] fenced out. [illegible] quarter section [illegible] east line of said quarter section. It was also claimed by [illegible] to the south and to that [illegible] the south [illegible] section to the south west corner of the south [illegible] quarter thereof, and there south on the [illegible] line on eighty or ninety [illegible] the old trail [illegible] the west half of said south [illegible] 28, and connected with the road [illegible] by petitioner asserted

at the north west corner of said sixty acres. It thus appears that the old trail has been abandoned and the road placed on Section and half Section lines except that part passing diagonally across said north sixty acres of the west half of the south east quarter of said section 23, and it is with this part that we are now concerned".

Upon a ~~tx~~ re-trial in the court below the appellant introduced evidence which tended to show that for several years last past the old trail through the sixty acres mentioned had been almost if not entirely abandoned. That it had grown up in brush and was unfit for travel and that the travel during this period was east of the old trail and passed diagonally across appellant's meadow and connected with the old trail at or near the half section line. The alleged obstruction was placed near to or across the old trail at a place where it had grown up in brush and where the travel upon the old trail had ceased for several years last past and had been during this time passing diagonally over appellant's meadow as above stated. It is true that it appears from the evidence in this case that for forty years or more prior to the time that the travel was diverted across appellant's meadow that this old trail had been used in connection with an old trail passing through the north east quarter of said section and one passing through the south east quarter of the south west quarter of said section until the trail in the north east quarter was changed to the east and south lines of said quarter section and that of the south east of the south-west was changed to the east line of the south east quarter of the south west quarter of section 23, since which time these roads have been used in connection

at the north west corner of said [illegible] corner. It thus appears that the old trail has been abandoned and the road located on section and half section lines except that it [illegible] diagonally across said north [illegible] of the south east quarter of said [illegible] it is with this part that we are [illegible].

Upon a re-trial in the court [illegible] additional introduced evidence which tended to show [illegible] years last past the old trail through [illegible] tions had been closed [illegible] had grown up in [illegible] travel during this [illegible] passed diagonally across a [illegible] with the old trail at or near the [illegible] alleged obstruction was closed more or [illegible] trail at a place where it [illegible] the travel upon the [illegible] last part and had been [illegible] over a [illegible] appears from the evidence in this [illegible] or more prior to the time of [illegible] [illegible] in connection with the old trail [illegible] quarter of said section [illegible] east quarter of the south west quarter [illegible] the trail in the north west [illegible] and west line [illegible] east of the [illegible] south east quarter of the south west [illegible] since when there [illegible]

with the old trail in the south east quarter aforesaid, and the meadow road diverging from the old trail as aforesaid. The appellee insists that inasmuch as this road or old trail had been used by the public for travel for more than forty years prior to the shifting of the travel across appellant's meadow, that it became a highway by prescription. The appellant contends that inasmuch as the old trail passed through a timber county up until within a few years last past and that as the south east quarter of said section 23 had not been fenced that the law permitting the acquisition of a highway by user was not applicable and could have no force or effect where such highway passed through timber and unfenced lands, and cites in support of this contention the case of the town of Brushy Mound vs. McClintock, 150 Ill.,133, in which opinion it is said, "In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner".

It is insisted by appellee that because houses were built at three or four different places along or near this trail, one of which was built by the appellant, and because of the fact that this highway was worked by the public authorities that this was notice to appellant that the public was claiming it as a highway. It appears from the evidence that the houses that were built along this trail were built in the timber and at an early day, and while it does appear that some work was done upon this trail it was at entirely different points from the place in controversy. This record fails to show little if any work upon the highway at this

with the old trail in the south east quarter aforesaid, and the meadow road diverging from the old trail [illegible] eastward. The appellee insists that inasmuch as said road or old trail has been used by the public for travel for more than forty years prior to the building of the travel border on grandfather's meadow, that it became a highway by prescription. The appellant contends that inasmuch as the old trail passed through a timber country by which within a few years [illegible] and that on the south east quarter of a [illegible] section it was not been tended that the [illegible] condition of a highway by prescription was not applicable and could have no force or effect where such highway passed through timber and unfenced lands, and cites in support of this contention the case of the town of [illegible] v. [illegible], 1[illegible] Ill. 1[illegible], in which opinion it is said, "[illegible] a public highway, by prescription, over uninclosed land, there must be something more than mere travel over it by the public. It must appear that the user is such as to give the public a right to the land by virtue of the statute of limitations."

It is admitted by appellee that [illegible] built it there or [illegible] the trail, and [illegible] built by the [illegible], and because of the fact that it was [illegible] by the [illegible] contention that this was [illegible] the public was [illegible] it as a [illegible]. [illegible] that the [illegible] in the timber and [illegible] that some work was done upon the trail [illegible] different points from the [illegible] tended to make it [illegible] any such [illegible] highway [illegible]

place but a bridge was built upon the Dunkel road and another culvert or bridge built down upon the Payne part of the road but it is not clear whether these bridges were built before or after the road had been changed at these places; and while it is true that appellant did work the road, yet such work was done up near the school house the distance of nearly one mile from the place in question.

It is also insisted that the changing of the roads by Dunkel on the north east quarter and by Payne on the south half of the south east quarter of the south west quarter was notice to appellant that the public was claiming this as a highway. As we read the record the highway upon the north east qurter known as the Dunkel road was changed by petition. That is to say, a petition was presented and a road laid out along the east and south lines of the Dunkel tract but there was no action taken showing any vacation of the old trail that ran diagonally through this tract, and substantially the same procedure was had as to the Payne tract. We are not able to see how the granting of the petition for the laying out of these roads upon the section and half section lines would be any notice that the public was claiming the old trail as a highway when no steps were taken tovacate the highway. It appears that as soon as the new roads were laid out upon the section and half section lines that the travel along the old trail was abandoned and passed around the new roads and we think that the principal part of the labor done upon the highway as shown by this record was at or near the Dunkel and Payne tracts. The only bridges shown to have been built were along near these tracts.

It is also claimed by appellee that at the time

single place but a bridge was built upon the Dunkel road and another culvert or bridge built down upon the Jayne part of the road but it is not clear whether these bridges were built before or after the road had been changed at these places; and while it is true that apparently did work the road, yet such work was done on near the school house the distance of nearly one mile from the place in question.

It is also indicated that the changes of the roads by Dunkel on the north east quarter and by Jayne on the south half of the south east quarter of the south west quarter are notice to appellant that the public was claiming this as a highway. In we read the records the highway upon the north east quarter from the Dunkel records changed by petition. That is to say, a petition was presented and a road laid out along the west and north line of the Dunkel tract but there was no action taken claiming any vacation of the old trail that ran diagonally across the tract, and substantially the same procedure was followed as to the Jayne tract. We are not able to see in the granting of the petition for the laying out of these roads upon the section and half section lines that the travel along the old trail was abandoned and changed around the new roads and we think that the [illegible] of the labor done upon the [illegible] was at or near the Dunkel and Jayne tracts. The [illegible] bridges shown to have been built were along these tracts.

It is also claimed by appellee that at the time

the petition was granted for a road east of the Payne tract that the appellant sold the commissioners a strip of land for the purpose of widening the road at that place, and appellee argues that this was an implied admission that the trail existed as a highway across his land. The Payne road, however, did not connect with the trail for thereafter the commissioners obtained the consent of Talbot to pass over a part of the twenty acres lying north of the Payne tract so as to connect with the trail and at about this time, or shortly thereafter, the line of travel across the meadow was installed and that road principally used. It is true the witness Stover says that the, "Appellant knew the public authorities claimed this road and that it was a public highway". This, however, is only a conclusion of the witness and it is not shown how he knew it. This conclusion, however, seems to have been formed about 1911 at a time when the appellant obstructed another portion of the trail with logs

It is said that the appellant started the meadow road himself by directing others to go that way about the years 1905 or 1907, and says that, even after that, one or two teams a week passed over this old trail. If the old trail was a public highway eight or ten years before this obstruction was placed there then the appellant by his direction could not have diverted the travel along another and a different line and it seems to us that the very fact that he did direct and divert the travel from the old trail tends very strongly to show that even at that date he was not in any manner assenting to the old trail being used as a highway. It was testified to by appellant, and now insisted upon,

the petition was granted for a road east of the Payne tract

that the appellant sold the commissioners a strip of land

for the purpose of widening the road at that place, and

appellee argues that this was an implied admission that the

trail existed as a highway across his land. The Payne

road, however, did not connect with the trail for there-

after the commissioners obtained the consent of Talbot to

pass over a part of the twenty acres lying north of the

Payne tract so as to connect with the trail. At about

this time, or shortly thereafter, the line of travel across

the meadow was installed and that road exclusively used. It

is true the witness Tolver says that the "appellant here

the public authorities closed the road and that it was a

public highway". This, in fact, is only a conclusion of the

witness and it is not a fact we can look to upon it. This conclusion,

however, seems to have been formed prior to 1921. At the time when

the appellant objected another portion of the trail with logs

It is said that the appellant attempted to plow below

road himself by diverting others to go that way since the

year 1918 or 1919, and says that, even before that, the ex-

tra teams took a road over the meadow. If the old trail

was a public highway right of way in its entirety, the obstruc-

tion was illegal. Were then the appellants by the construction

could not have diverted the travel along a shorter and a di-

rect line and it seems to be quite the very thing that the

old direct and direct the travel from the old trail to

very strongly in favor of the contention that the

any manner according to the old trail. [illegible]

way. It was entitled to [illegible] and [illegible] upon,

that appellant plowed across a part of this highway in 1902 and while other witnesses fix a later date of plowing across the highway, they do not deny that he plowed across it at the time he stated.

It is also contended that a survey of this trail was made in 1886 and the surveyor testified that he was employed to make the survey by the highway commissioners, but the making of the survey even under the direction of the highway commissioners can not be regarded as record evidence of a prescriptive right but could only be evidence of the situs of a road that had already been established. Seidschlag vs. Town of Antioch, 207 Ill.,280. And such survey or setting of stakes cannot be evidence of a dedication because there is nothing in the record to show that the owner of the land at that time had any notice of or was present at such survey and so far as we can find the survey was not made in accordance with any statutory regulation, and none has been pointed out to us. This land was at the time of the making of the trail in question timber land, vacant and unoccupied and continued to be so until within a few years last past, and then only a spot here and there was cleared up and put in cultivation, and it continued to remain uninclosed until the time of the placing of the obstruction in the alleged highway. To constitute a highway by prescription, "The use must be adverse, uninterrupted, exclusive, continuous and under a claim of right. (Schmidt vs. Brown, 226 Ill.,590). Where the use is merely permissive by the owner it is not adverse and forms no basis upon which a right of way by prescription can rest. The use of vacant, unenclosed and unoccupied land will be presumed to be by permission and not adverse. (O'Connell vs.

that superfluous plowed across a part of this highway in 1902 and while other witnesses fix a ten date of plowing across the highway, they do not say that he plowed across it at the time he stated.

It is also contended that a survey of this trail was made in 1886 and the surveyor testified that he was employed to make the survey by the highway commissioners, but the making of the survey even under the direction of the highway commissioners can not be regarded as record evidence of a prescriptive right but could only be evidence of the status of a road that had already been established. Hatchings vs. Town of Ontario, 27 [illegible], 98. The mere survey or setting of stakes cannot be evidence of a dedication unless there is nothing in the record to show that the owner of the land at that time and any notice of or his consent of such survey and so far as we can find the survey [illegible] in accordance with any statutory authority, has never been carried out to date. This land [illegible] the location of the trail in question [illegible] and continued to be [illegible] it, and then only a foot [illegible] and there [illegible] in cultivation, and it continued [illegible] until the time of the filing of the petition in the alleged highway. To constitute a highway by prescription, [illegible] open, uninterrupted, continuous, [illegible] a claim of right. (Hatchings vs. Town, 27 [illegible]). [illegible] the use is rightly [illegible] [illegible] to such a [illegible] by proper claim for [illegible]. Houses of worship, [illegible] and unenclosed land will be presumed to be by permission and [illegible]. (Hatchings vs.

Chicago Terminal Railroad Co., 184 Ill.,308, and cases there cited). An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. (City of Quincy vs. Jones, 76 Ill.,231); I.C.R.R.Co., vs. Stewart, 265 Ill.,37.

It appears from the evidence in this case that there were fifty-two angles in this trail and that there were nine angles from where the road enters the appellant's land to whether it passes out of it, and according to this testimony it must have been a very tortuous route and the small amount of work that was done upon this road, especially where it passed through appellant's land, and other acts of recognition as claimed by appellee, are not in our judgment sufficient to warrant us in saying that the appellee has established a highway at the place of the obstruction. "Our experience teaches that land has been used by the public in different parts of the state, for purposes of travel, when it was vacant and unoccupied, the owner having no occasion to occupy it exclusively. It would be unjust to say that the public, by this acquescence, under such circumstances, acquired a title to a part of the land. (Kyle vs. Town of Logan, 87 Ill.,64). In order to establish a public highway, by prescription, over uninclosed lands, there must be something more than mere travel over it by the public. It must appear that the user is under a claim of right in the public, and not by mere acquiescence on the part of the owner. Express notice is not necessary, but there must be such conduct on the part of the public authorities as to reasonably inform the owner that the highway is used under a claim of right. In the first place, it is unreasonable to suppose that road

Chicago Terminal Railroad Co., 184 Ill., 506, and cases there cited). An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. (City of Quincy vs. Jones, 76 Ill., [illegible] Stewart, 228 Ill., 37.

It appears from the evidence in this case that there were fifty-five [illegible] in this trail and that there were nine [illegible] where the road ran [illegible] appellant's land to whether it passes out of it, and according to this testimony it must have been a very circuitous route and the small amount of work [illegible] upon this road, especially where it passes through appellant's land, and [illegible] recognition [illegible] by [illegible] judgment sufficient to warrant [illegible] "Our experience teaches that land [illegible] has been used by the public in different parts of the state, [illegible] when it was vacant and unoccupied, [illegible] no occasion to county it [illegible] to say that the public, by their acquiescence, [illegible] acquired a title to [illegible] of Logan, 87 Ill., 64. [illegible] by [illegible] thing more than [illegible] open [illegible] and by some acquiescence [illegible] presumptive notice is not [illegible] on the part of the public [illegible] the owner than the highway [illegible] In the first place, it is [illegible] that road

authorities would claim, or a property holder suspect, that a public highway was to be located on the tortuous line of the road in question. The little work done on it in all the years that it has been traveled can not be said to amount to notice that it was being used under a claim of public right. The work did not amount to an improvement of a public highway. It was rather for the temporary purposes of travel". Town of Brushy Mound vs. Ecklintock, Supra.

After a careful examination of this record we can see no reason for changing our minds from that expressed in the former opinion in this case, and the judgment of the lower court is reversed.

JUDGMENT REVERSED

FINDING OF FACTS.

We find that the evidence in this case fails to show that a public highway existed at the place where appellee claims the obstruction was built.

Not to be reported in full.

authorities would claim, or a property holder argued, that a public highway was to be located on the north one line of the road in question. The little work done on it in all the years that it was open to vehicles can not be held to amount to notice that it was being used under a claim of public right. The work had not amounted to a dedication of a public highway. It was a mere [illegible] of travel, from of [illegible] and [illegible].

After a careful examination of this record we can see no reason for changing the conclusion reached in the lower opinion in this case, and the judgment of the lower court is reversed.

[illegible]

[illegible]

[illegible] the [illegible] is quite free from doubt to [illegible] public highway existed in the place where we [illegible] the [illegible] evidence.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* April *A. D. 191*8

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

211 I.A. 119

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Peter Hackethal,
Appellee

vs.

No. 50
~~October~~ March Term, 1917.

East Side Levee & Sanitary District,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 50. In the Appellate Court, Agenda No.37.

Fourth District.

March Term, 1917.

Peter Hackethal, Appellee. vs. East Side Levee & Sanitary District, Appellant.	Appeal from the Circuit Court of Madison County.

McBride, J.

The appellee recovered a judgment against the appellant in the court below for seven hundred dollars and costs, to reverse which this appeal is prosecuted.

The principal facts in this case are, that in 1910 and 1911, appellant constructed a large canal, one hundred feet wide at the bottom and ten feet deep, with levees or embankments upon each side of the height of from ten to twelve feet and of the width of about fifty feet. This canal is commonly called the Cahokia Creek Diversion Channel and is about four and a half miles long and extends from its junction with Cahokia Creek where the Wabash Railroad intersects the creek in Edwardsville Township in Madison County, Illinois, and extends due west to the Mississippi river. It does not follow any natural water course and has no inlets to permit the water from the adjoining lands to pass through this embankment. The lands in possession of appellee, lay north of this embankment and were of about the same character with reference to fertility, and the lay of the land as the lands were in the case of Landfelder vs.

East Side Levee & Sanitary District, the appellant herein, 194 App.,262, and of the case of Loehn vs. East Side Levee & Sanitary District decided by this Court at the March Term 1916, not yet reported.

The evidence tends to show that in case of heavy rain falls the waters flow from all of these lands south to this embankment. It further appears that on the east of these lands there is an embankment built by the Bluff Line Railroad, and some of the witnesses state that the water in a state of nature, and before either of these embankments were constructed flowed south and east but that the construction of the Bluff Line Railroad prevented the water from flowing to the east and since that time its flow has been to the south. The principal questions involved in this case have twice before been presented to and determined by this court in the cases above referred to, and this court in both cases held that the appellant was liable for damages done to the crops to the extent that the embankment impeded the natural flow of the water. As this case will have to be reversed on account of an erroneous instruction, as hereinafter noted, we deem it unnecessary to discuss the liability under other errors assigned.

It does appear from the record in this case, however, that this water in a state of nature flowed to the east, as well as to the south, but the embankment erected by appellant only obstructed the waters coming to the south, and the embankment erected by the Bluff Line R. R. obstructed the waters flowing to the east, at least tended to, and the evidence tended to show that both of these embankments, to some extent, obstructed the natural flow of the water.

[illegible] side levee [illegible] District, the appellant [illegible] in, 194 A. [illegible], 182, at the [illegible] of [illegible] the levee a sanitary district decided on [illegible] 1918, not yet reported.

The evidence tends to show [illegible] in case of heavy rain fall the waters flow [illegible] into and south to this embankment. It further appears [illegible] on the east a [illegible] there is no [illegible] natural [illegible] in a state of nature, and [illegible] were constructed along [illegible] but the construction of the [illegible] levee [illegible] prevented the water from flowing to the east [illegible] east to the [illegible] liberal [illegible] came more large [illegible] to [illegible] by this court in the [illegible] in both cases [illegible] the appellees [illegible] done to the [illegible] the natural flow of the water [illegible] recovered on account of [illegible] water [illegible] under other [illegible].

[illegible] ever, the [illegible] [illegible] by negligence [illegible] and the [illegible] the water [illegible] evidence [illegible] to some extent, [illegible]

The appellee's tenth instruction is as follows, "The court instructs the jury that even if you find from the evidence that the Bluff Line Railroad combined with the levee of the East Side Levee and Sanitary District caused the damage to plaintiff's crops by holding the water upon the lands of plaintiff of Peter Hackethal, still this fact, if such be a fact, will not relieve the defendant from liability in this case, and as to such damages, if any, you shall find a verdict for the plaintiff". This instruction is erroneous. It permits a recovery against the appellant for damages done by the combined act of appellant and the Bluff Line R.R. There is no evidence in this record tending to show that the Bluff Line Railroad and the appellant jointly constructed these embankments but one was constructed by the Bluff Line at one time and the appellant at another, and so far as the record discloses, neither had anything to do with the construction of the other's embankment. Under such conditions the appellant could not be liable for any damages inflicted by the wrongful act of the Bluff Line Railroad.

Counsel for appellee cite the case of Kankakee & Seneca R.R. Co., vs. Horan, 131 Ill.,288, in which it is decided that all who contribute to a tort by their acts or otherwise, are liable and become joint tort feasors. This is undoubtedly the law but we do not think it applicable to this case, as there is no evidence to show them to be joint tort feasors, and it is admitted by counsel for appellee that they are not joint tortfeasors, and it certainly is the law that if the wrong complained of consists of two independent acts and performed by two independent parties, at different times, that each party will be liable only for the amount it

The appellee's tenth instruction is as follows, "The court instructs the jury that even if you find from the evidence that the Bluff City Mill Pond contained with its levee of the East side levee and pumping station caused the damage to plaintiff's crops by holding the water upon the lands of plaintiff or Peter Rosenthal, yet this fact, if such be a fact, will not relieve the defendant from liability in this case, and he to such damage, if any, has shall be a verdict for the plaintiff". This instruction is erroneous. It permits a recovery against the appellant for damage done by the combined act of appellant and the Bluff City Mill. There is no evidence in this record tending to show that the Bluff City Mill Pond and the appellant jointly constructed these embankments but one was constructed by the Bluff City Mill at one time and the appellant at another, and in fact as the record discloses, neither had any thing to do with the construction of the other's embankment. In a case of such a condition the appellant could not be liable for any damage indicated by the wrongful act of the Bluff City Mill Pond.

Counsel for appellee cite the case of Chicago & Eastern Ill. R. R. Co. vs. Adams, 151 Ill. 43, in which it is decided that all who co-operate in a tort by to act or otherwise, are liable as joint tort feasors. In the instant case, we think we have a case which is similar to this case, as there is no evidence to show that the appellant tort feasors, and it is accordingly reversed for the reason that they are not joint tort feasors, and it is the law that if the wrong complained of is caused by one independent act and performed by the independent action, [illegible] times, that each wrong will be the sole cause of the damage it

contributed to the damage sustained. The Equitable Powder Mfg. Co. vs. C.C.& St.L.R.R. 155 Ill.App.265; Luce vs. Fox & W. Imp. Co. 19 Ill. 112; Willard vs. Red Bank Oil Co., 151 Ill.App. 433. This instruction was erroneous and warranted the jury in giving to appellee a larger verdict than he was entitled to, and for this reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported in full.

contributed to the damage complained. The instructions [illegible] Mfg. Co. vs. [illegible] 1.1.App. [illegible] Fox & T. Imp. Co. 15 App. D.C. 1[illegible] [illegible] vs. [illegible] 101 U.S. 4[illegible]. This instruction was erroneous and warranted the jury in giving to appellee a larger verdict than he was entitled to, and for this reason the judgment is reversed and the cause remanded.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* April *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

4/15

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 120

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Stanley Milauskis,
Appellee

vs.

No. 52
October Term, 1917.

Terminal Railroad Assn. of St.Louis,
Appellant

~~ERROR TO~~
APPEAL FROM

City COURT

East St. Louis ~~COUNTY~~

TRIAL JUDGE

HON. W. M. VANDEVENTER

Term No. 58. In the Appellate Court, [illegible]

Fourth District.

October Term, [illegible] 1917.

Stanley Milauskis, Appellee.	
vs.	Appeal from the City Court of East St. Louis, Ill.
Terminal Railroad Association of St. Louis, Appellant.	

Mcbride, J.

The appellee recovered a judgment against appellant in the court below for two thousand dollars and costs, which it is sought to reverse by this appeal.

It appears from the record in this case that the appellant is the owner and possessed of a great number of railroad tracks in the city of East St. Louis consisting of one lead track and thirty or thirty-five yard tracks. The yard tracks extend in an easterly and westerly direction and the lead track in a northerly and southerly direction. The lead track crossed St. Clair Avenue at or near Cahokia Creek. The ice plant at which appellee was employed at work at the time of the injury is about one quarter of a mile south of St. Clair Avenue. The building known as the Armour office was located near this lead track and about half a mile in a northerly direction from the ice plant. It further appears that the ice plant was surrounded by the railroad tracks of the appellant and that there was no public way for the employes of the Armour Company to reach the ice plant from the streets of the city of East St. Louis except by passing over appellant's property. There was a

beaten track of the width of four feet or more on the west side of the lead track extending from below the ice plant up to or near St. Clair Avenue, and the men employed at the ice plant usually came from St. Clair Avenue down across and over appellant's railroad tracks and along this beaten track and had done so for twenty years. The ice plant was used for the re-icing of cars and it did business with Armour & Company, Swift & Company, Morris & Company and other packing plants and fruit dispatchers. The cars of the several companies were run in to the ice plant upon the tracks of appellant, re-iced and then pulled out onto the main track for shipment. The appellee had been employed at work for the Armour Car Line Company for about five years prior to receiving the injury complained of, and on the 16th day of July 1913 at about the hour of ten o'clock a.m. the appellee received an order for the payment of his wages and was directed by the Armour Car Lines Company to take the order up to the office of Armour & Company for payment. Appellee and five or six of his associates went with their orders to Armour & Company office, obtained payment and were returning to their work and after crossing St. Clair Avenue passed down on the west side of the lead track along this beaten path and after going a short distance south from St. Clair avenue appellee was struck by one of appellant's cars, knocked down, fell under the car and was badly injured. It further appears that just after the appellee had left St. Clair Avenue that he passed a train consisting of an engine and five or six cars on appellant's track, and it further appears that very shortly after passing the first car that the appellant without sounding the whistle or ringing the bell pushed the rear car in and upon this lead

track and it was permitted to run down the track without any brakeman and no warning given of its approach and it came upon appellee from the rear and struck him. It also appears that appellee and one other person were walking side by side along this beaten track at the time the car struck appellee, and there were three or four persons walking singly behind appellee and the car passed by them but they did not observe it until it passed and they had no warning of its approach. It also appears that at this time another train was passing along appellant's tracks close by which made considerable noise so that appellee nor any of his associates heard or knew of the approach of this car until it reached them.

It further appears from the evidence in the case that on and prior to May 1913 there had been some pilfering in the yards and Mr. Taylor, the superintendent of the Armour Car Lines, and Mr. Krause, the superintendent of the ice house, had a conference with Mr. Burlingame, the general superintendent of appellant, with a view of stopping the men from traveling over the railroad lines and was confining them to some particular place. Mr. Burlingame referred them to a Mr. Hines and as a result of the conference it was agreed that the employes should be directed to pass to and from their work along this beaten pathway on the west side of the lead track, where appellee was traveling at the time he was injured. The employes of the Armour Car Lines were called together at that time and notified of the result of the conference and directed thereafter to travel along this beaten way. The appellee was present at the time this direction was given to the employes as aforesaid.

The appellee filed three original and three amended counts. The first count, after setting forth the facts substantially as above detailed, avers that while he was in the exercise of due care for his own safety the defendant on the track near to where such space or pathway was located carelessly and negligently and without any warning pushed a large number of freight cars along and over said track without giving any warning but negligently and carelessly omitted to sound any bell or whistle whereby plaintiff could be advised of the approach of said cars and by reason thereof he was struck and injured.

The second and third original counts are substantially the same as the first, varying only in details.

The amended counts to the declaration charge substantially the same negligent acts on the part of appellant as the original counts; that is, that they pushed the said cars down the track without giving any warning or signal of any kind and without having any brakeman or other person upon the rear car. The principal difference in the amended and original counts is that in the original count he charged that he was in the employ of the Armour Company at the time and in the amended counts he charges that he was in the employ of the Armour Car Lines. The difference between the amended and original counts will be hereinafter more specifically commented upon.

The errors assigned and argued by counsel for appellant are, that the appellee was at the time of his injury a trespasser, and that the appellant owed him no duty other than that of refraining from wilfully or wantonly injuring him. There can be no doubt of the correctness of this doctrine which has been announced time and time again by the

several courts of this state. The question, however, that concerns us most under the facts in this case is, "Was the appellee a trespasser". While it does not appear that the appellee was engaged at work or directly connected with the appellant, yet it does appear that he was at work for the Armour Car Lines Company which was engaged in the re-icing of cars that were shipped into the ice plant and taken therefrom by appellant's engines and on its track so that in the performance of appellant's work it was necessary to re-ice these cars and to do so some one must perform this work and appellee was then engaged at this work. The appellant was interested in the prosecution of this work and we do not understand the law to be that one must be engaged specifically in the work of the owner of the premises before he can lawfully enter such premises. He may be engaged in the work the prosecution of which implies that he should enter upon such premises, or there may be an expressed invitation for him to enter upon the premises, as we think there was in this case. "The duty to one who comes thereon by the owner's invitation to transact business in which the parties are mutually interested is to exercise reasonable care for his safety while on that portion of the premises required for the purpose of his visit. Under such circumstances the party is said to be on the premises by implied invitation of the owner". Kenney vs. Union Stock Yards Co., 235 Ill., 586. While appellee was engaged in his work at the ice plant it must be remembered that there was no other mode of access to this plant except over the property of the appellant, and this was known to the appellant when it was placing its cars at the plant for re-icing and it certainly was interested

in having them re-iced.

It further appears that in the month of May, prior to this injury, that the appellant had designated the particular route that appellee should take in going to and returning from his work at this ice plant, and the appellee was at the time of his injury pursuing the route so directed and this, in our mind, would constitute an expressed invitation to pass over appellant's premises to perform the work in which the appellant, to say the least of it, was at least interested. The same doctrine is sustained by our Supreme Court in the case of Reuckner vs. Wakes, 271 Ill., 2[illegible]. It was further said in the case of Reuckner vs. Wakes, supra, that there is a well defined distinction between a mere licensee and one who comes upon the premises of another by invitation, express or implied, and that to come upon the premises under an implied invitation means that the visitor is there for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on. The same thing is said in the case of Curtell vs. Philadelphia Coal Co., 256 Ill., 11[illegible]. The appellee was at the time of his injury engaged in a work in which he and the appellant were both interested, and he was traveling along the route designated by the appellant and we do not believe that he was a trespasser.

It is next contended by appellant that even if appellee was not a bare licensee and was at the place in question by invitation of appellant, still he has failed to prove that he was in the exercise of due care and caution for his own safety. There is no rule of law better settled than that where there is any evidence fairly tending to show

due care or circumstances from which such may be inferred that the finding of a jury upon this question is conclusive. There has been nothing developed upon this trial that leads us to believe or to say that the appellee was not in the exercise of due care. He was walking along the beaten path in a usual manner, and while the pathway was of the width of four feet he would not necessarily be required to walk upon any particular part of this pathway, unless there was something in the surrounding conditions that would indicate that he should do so, and there was nothing of the kind here, as the evidence is very clear that the appellant was negligently operating its cars and running them backward without any brakeman or other person upon the car to control it, and without giving any warning of any kind by which the appellee or any of his associates could know of its approach, and not knowing or having any reason to know of the car coming we can not say that the verdict of the jury was manifestly against the weight of the evidence in finding that he was in the exercise of due care for his own safety. The questions of whether appellant was guilty of negligence or the appellee guilty of contributory negligence at the time of the injury were questions of fact which were properly left by the court to the jury. Elgin, Joliet & Eastern Ry. Co. vs. Thomas, 215 Ill., 158. Wabash Ry. Co. vs. Brown, 152 Ill., 484.

It is next insisted by counsel for appellant that the court erred in sustaining the demurrer to the plea of the statute of limitations filed herein. This accident happened July 16, 1913. The original declaration was filed December 31, 1914; the amended declaration was filed March

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in [illegible]

[illegible]

22, 1917, more than three years after the happening of the injury. The amended declaration as claimed by appellant was to the effect that in the original declaration it was alleged that Armour & Company owned and operated the ice house and that appellee was an employe of Armour & Company, and that the allegations with reference to the right to use the pathway were alleged to have been given to the employes of Armour & Company, and the allegations with reference to the damages were that appellee's right arm was amputated; that in the amended declaration it was alleged that the ice house was owned by Armour Car Lines and that appellee was an employe of Armour Car Lines, and the rights to the use of the pathway are alleged to have been granted to the employes of the Armour Car Lines, and that the allegations with reference to the damages are that appellee's left arm and the finger of his right hand were amputated. It is true, as appears from an examination of the declaration that in the original counts it is alleged that appellee was engaged at work for Armour & Company and in some places that the permit to use the path was given to the employes of Armour & Company who were required to labor at such ice house, and some other differences are suggested, but as we view it none of these questions are material and none of them go to make up the cause of action in this case. The cause of action is based upon the negligence of the defendant as charged in the original and amended counts of the declaration, and the exercise of due care by the appellee and his right to recover, in the original as well as the amended counts, all of them show upon their face that appellee was upon appellant's premises by invitation so that the questions as to who owned and

22, 1917, more than three years after the happening of the injury. The amended declarations [illegible] filed by appellant are to the effect that in the original declaration it was alleged that Armour & Company owned and [illegible] the garage and that appellee was [illegible] employe [illegible] company, and that the allegations with reference to [illegible] the [illegible] way were alleged to have been [illegible] of Armour & Company, and the [illegible] to the damages were that appellee [illegible] in the business [illegible] was owned by [illegible] ployed [illegible] company [illegible] the [illegible] ence to [illegible] ling [illegible] pare from [illegible] original counts [illegible] work for [illegible] company [illegible] ure [illegible] company [illegible] and other [illegible] of their [illegible] any [illegible] cerns [illegible] cited [illegible] stricted [illegible] in the original [illegible] entry [illegible] Lacey [illegible]

operated the ice plant, and for whom the appellee was at the time engaged at work, can not be material. They are only circumstances attending the question as to his right to be upon the property of appellant. They are mere details out of which the right that he alleges did exist arose. In the case of Swift & Co. vs. Foster, Admr. 163 Ill.,5?, it was held that the addition of counts in a suit for the death of an employe from the fall of lumber while being hoisted, charging that such fall was due to the use of a defective cog wheel, is not the setting up of a new cause of action barred by the statute of limitations, subsequent to the original commencement of the cause although it was originally alleged that the fall was from the negligence of an employe, not a fellow servant, in using the machinery. The original declaration in this case did state a cause of action but after having stated such cause of action, giving the negligence of appellant and the care of appellee it recited other facts by which its rights accrued but does not introduce any new cause of action, and we do not believe that the filing of this amended declaration was barred by the statute of limitations. Carlin vs. City of Chicago, 262 Ill.,572. It may be true that in the statement of these matters, that did not go to make up the acts of negligence complained of, might from the facts in the case constitute a variance. When such facts developed that did not necessarily go to make up the cause of action the court, on motion, at any period in the trial would permit an amendment so as to avoid the variance, "But the doctrine of variance is one thing and the statement of another and different cause of action is something else". Carlin vs. City of Chicago, Supra. It

operated the ice plant, and the [illegible] at the time engaged of [illegible], can not be [illegible]. [illegible] only circumstances attending the [illegible] to be upon the [illegible] of appellants. [illegible] but of which the [illegible] he alleges the [illegible] in the case of [illegible], it was held that the addition of [illegible] an employe from the [illegible] of [illegible]. operating [illegible] cog wheel, [illegible] decreed by the [illegible] cut, that [illegible] alleged that [illegible] and fellow [illegible] contention [illegible] alleging [illegible] ence of [illegible] tents [illegible] any new cause [illegible] this or such [illegible] trial [illegible] from [illegible] such [illegible] the [illegible] the [illegible] the [illegible] the [illegible] operating plant [illegible]

appears to us that the effect of this amendment was simply to avoid a variance and did not state a new or different cause of action.

We are of the opinion that the verdict in this case was fully justified by the evidence and that the court did not commit any reversible error in the trial of the case, and the judgment of the lower court is affirmed.

JUDGEMENT AFFIRMED.

Not to be reported in full.

appears to be that the plaintiff [illegible] sufficiently to avoid a variance and did not [illegible] a different cause of action.

We are of the opinion that the evidence in this case was fully justified by the evidence and that the court did not commit any reversible error in [illegible] of the case, and the judgment of the lower court is affirmed.

[illegible]

not to be considered in this.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 10th *day of* April *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Albright & Lawrence,
Appellees

vs.

No. 70
October Term, 1917.

Illinois Central Railroad Company,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Union COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 70. In the Appellate Court, Agenda No.36.

Fourth District.

October Term, 1917.

W.A.Albright and N.T.Lawrence, doing business as Albright & Lawrence, Appellees.	
vs.	Appeal from the Circuit Court of Union County.
Illinois Central Railroad Company, Appellant.	

McBride, J.

Appellee instituted an action of assumpsit against the appellant in the Circuit Court of Union County, Illinois, to recover damages for injuries to horses and mules shipped on one of appellant's trains from Dongola, Illinois, to East St. Louis on October 23, 1916.

It appears from the evidence that on the 23rd day of October 1916, the appellees loaded in to a stock car at Dongola at about six o'clock in the evening eight horses and three mules belonging to them, together with three cattle and seventy-five hogs belonging to Fred Johnson and Thomas Keller. A board partition was put in the car to separate the horses and mules from the rest of the stock. This board partition consisted of an oak plank nailed across the car with eight penny nails. The horses and mules were not tied. It appears that the agent of appellant was present at the time of the loading of this car of stock and made no objection to the manner in which it was loaded. It further appears from the evidence that these horses and mules were in good condition at the time that they were loaded, except that one

Term No. 70. In the Appellate Court, Appeals No.36.

Fourth District.

October term, 1917.

W.A.Albright and W.J.Lawrence, doing business as Albright & Lawrence, Appellees.	
vs.	Appeal from the Circuit Court of Marion County.
Illinois Central Railroad Company, Appellant.	

Appellee, A.

Appellee instituted an action [illegible] against the appellant, in the Circuit Court [illegible], alleging, to recover damages for injuries to [illegible] on one of appellant's trains [illegible], to wit, to wit: October 30, 1917.

It appears in the evidence that on the [illegible] day of October 1917, [illegible] appellee [illegible] appellant [illegible] and county-line [illegible] Illinois. [illegible] litigation [illegible] right-of-way [illegible] a [illegible] of [illegible] to the [illegible] from [illegible] condition [illegible]

of the mules about six months previous to this time had pneumonia and was afflicted with what they call pones under the belly but the evidence of one of the appellees is that this mule had entirely recovered before the shipment, and this is not disputed. The testimony of appellees witnesses further tends to show that the horses and mules were properly loaded, were not vicious and would not kick nor bite and that some of them had been in shipments prior to this time. It further appears that at Anna, Carbondale and Duquoin, cities through which the train passed, that the horses were restless and were kicking and squealing at the different stops made by the train before it reached Pinckneyville and when they arrived at Pinckneyville the mule in question was down and two planks were kicked off the side of the car on the end in which the horses were loaded. It further appears that at Pinckneyville the stock was unloaded and the mule was pulled out of the car and shortly thereafter died. The remainder of the stock was placed in the car and on a later train shipped into East St.Louis. The evidence further tends to show that when the horses reached their destination that some of them were injured, one of them had a dent in one eye, the other eye skinned, the legs were swollen and skinned in places, and some evidence tending to show that some of the horses were permanently injured. The jury found a verdict for the appellees and judgment was rendered thereon for $97.50, which appellant insists is contrary to the evidence in the case.

It is insisted by counsel for appellant in their argument that even if the stock was loaded in good condition and health that appellees failed to show that it was in an injured condition when unloaded at the National Stock Yards, and then says that the first time the stock was seen by

of the mules about six months previous to [illegible] had pneumonia and was afflicted with [illegible] under the belly but the evidence of [illegible] this mule had entirely recovered [illegible] is not disputed. [illegible] further tends to [illegible] injured, were not vicious and [illegible] of them had been in a quiet [illegible] further [illegible] through the train passed, [illegible] were kicking and squealing [illegible] train before it [illegible] arrived at [illegible] were [illegible] notes were [illegible] the stock [illegible] and mostly [illegible] placed in the [illegible] [illegible] motors [illegible] them, [illegible] skins, [illegible]

[illegible]

appellees after its arrival was twelve hours after it had been placed for unloading by appellant. It may have been several hours after the car had been placed for unloading before the appellees saw the stock but the car was placed upon what they called the ice plant switch and there left standing and one of the appellees testified that he saw this stock in about one hour after it had been unloaded and it was then in an injured condition and describes the horses limbs as being skinned and swollen and the xxx eyes of one of the horses injured, and giving other descriptions that tended to reduce the market value of the horses. The witnesses for appellees testified that the horses and mules were in good condition and properly loaded at the time they were put upon the cars at Gondola, and that the agent of appellant was present and made no objection to the manner in which the horses and mules were loaded, and we believe that the jury were warranted in finding that the stock was properly loaded and that it was not in good condition when it reached its destination and this of itself is sufficient to create a liability against the appellant unless it is made to appear from the evidence that the injury was attributable to the act of God, the public enemy or the vices of the animals themselves. Burke vs. U. S. Express Co., 87 App.,505. It is true that it appears from the testimony that when the train was stopped at the several stations above named that the train men heard the horses squealing and kicking and that was kept up until they arrived at Pinckneyville when they, for the first time, discovered that the mule was down. It appears that when the mule got down that it crowded the other horses so that they were fighting one another and this may have been the condition in which the stock was in at the dif-

times at the different stations that the train men heard them kicking and squealing but they failed to ascertain what the trouble was until they arrived at Pinckneyville.

It is insisted by counsel for appellant that it was negligence in the appellees to ship the mule above described because of its former condition but under the testimony of the witnesses for the appellees at the time that the mule was shipped and the fact that it had fully recovered from the fever several months before this shipment and was in good condition at the timeof the shipment, we are unable to say that the jury were manifestly wrong in finding that the appellees were not guilty of negligence in shipping this mule, and this direct question was presented to the jury by the instructions of the defendant.

These are all of the points now urged by appellant in its argument for a reversal and all of them were submitted to the jury by definite and particular instructions and they were all questions of fact upon which the evidence of appellees tended to show that the stock was in good condition when it was loaded, that when it arrived at its destination and was unloaded that it was injured and that it was properly loaded and not vicious, while the evidence of appellant tended to show the opposite of these questions or at least a part of them but the jury determined the issues of fact thus made in favor of the appellees. The judgment is small and we can see no reason for holding that the verdict of the jury was manifestly against the weight of the evidence, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* April *A. D. 191*0

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

211 I.A. 135

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the fifth day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Sallie Odom,
Appellee

vs.

No. 71.
October Term, 1917.

Joe Norwodowski et al,
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. BENJAMIN W. POPE

Term No. 71. In the Appellate Court, Agenda No. 21.

Fourth District.

October Term, A. D. 1917.

Sallie Adom, Appellee.	
vs.	Appeal from the Circuit Court of Williamson County, Illinois.
Joe Sorvondowski, Antone Sotkerice, Barney Tonezzi, Louis Sarconi, Joe Sarretta, Anton Zhrandkrezge, Peter Sankie, James Soudy, W. H. Williams, and Albert Barney, Appellants.	

Mc Bride, J.

It appears from the record in this case that Sallie Adom, the appellee, and Jennie Adom and others, children of Sallie Adom and Jem Adom, commenced separate suits against the appellants in Franklin County; thereupon a change of venue was taken to the Circuit Court of Williamson County and the two cases were tried together upon the same evidence and separate verdicts were rendered, one in favor of the wife Sallie Adom for five hundred dollars and one in favor of the children Jennie Adom et al for seven hundred dollars; to reverse which judgments these appeals are prosecuted and presented to this court upon one record.

It appears from the record in this case that Sallie Adom and Jem Adom were married on October 7, 19[illegible] and that there was born to them six children, namely, Jennie, Sylvester, Charley, [illegible], Virgil and James, the eldest of whom is fifteen years and the youngest three years old. That the husband Jem Adom was at one time engaged in farming

and later with the Jenkins Oil Company and for the Butler Construction Company. That up to about August 1915, and even after that he had been earning a good salary and had supported his wife and children reasonably well, furnished them with a comfortable home and supplied them with the reasonable necessaries of life. That prior to August 1915 he had become addicted to the use of intoxicating liquors but the habit after that grew upon him very rapidly and he frequently became intoxicated, often having to be carried to his home; that he finally began to neglect his family, failed to support them or even furnish them with the necessaries of life and that the family was at times, after August 1915, dependent upon her kindred and others for support. The husband continued his drinking excessively until some time in January 1916 when he became insane. An inquest or commission was had and this commission found that he became insane from the use of alcoholic liquors.

The evidence tended to show that before he acquired this habit of intoxication that he was an able bodied man reasonably competent and able to earn a good salary and furnished a livelihood and maintenance for his wife and children. The evidence further tended to show that the defendants knew of his habitual intoxication at the time they were selling him liquors. It also appears from the evidence of the appellants that prior to August 1915 the husband had at times become intoxicated.

The declaration, as shown by the record in this case, is in the usual form and charges that these defendants sold and gave intoxicating liquors to the husband which caused him to become and be habitually intoxicated

and in consequence of such intoxication he neglected and ceased to follow any gainful occupation and squandered his money and property for intoxicating liquors and neglected and failed to provide for his family with food and raiment and the necessaries of life and that in consequence of such habitual intoxication he became deranged and was on about the 28th of January 1917 adjudged insane and committed to the insane asylum at Anna.

The first error assigned and argued by appellants is that the judgment is contrary to the law and the evidence. Appellants insist that the evidence does not show that the defendant Antone Stetkewice sold or gave intoxicating liquors to Jem . Adom at any time or that there were any sales made between August 1, 1916 and January 28, 1916 by Antone Stetkewice, Peter Konkle, Barney Tonazzi, and Anton Hrncabongge during the time as alleged in the declaration. We do not so read this record. As we understand it, Harry Yates, Claude Fuller, Charlie Jones and W. . . Grippen testified that they had seen him drink during the summer and fall of 1916 in the several saloons referred to. As to the statement that no one testified that he was ever in the saloon of Antone Stetkewice is not sustained by the record, as it appears from the record that these several defendants were engaged in the saloon business in their respective saloons in West City and Claude Fuller, who says he was acquainted in West City, says "Well I have seen him in all the saloons out there. I have seen him buy at all places". And again says that he had seen him drink at all the places. It is true that he did not name Stetkewice particularly as being one of the places at which he saw him drink, but under the

evidence this place was included within the testimony given by Fuller and if counsel for appellants had desired to question it they could easily have called for the time and place of such drinking but they did not do so and Stetkewicz nor none of the defendants went upon the witness stand and denied having made any of these sales and we cannot say that the jury were not warranted in finding that he purchased liquor at the saloons of Stetkewicz, Kenkle, Tenazzi and Shrancabbagge, as well as the other defendants. The evidence of some of the witnesses in fact specified some of these saloons as places where he purchased and drank liquors. We can not say that the jury was not warranted in finding that he purchased liquors at these places and this was a question of fact for the jury to determine.

It is next insisted that the court erred in giving appellees instruction No. 1 because it refers to his habitual intoxication prior to August 1, 1915, being the time charged in the declaration from which his habitual intoxication began. It is true this instruction refers to his intoxication prior to that date and then advises the jury that even though he was in the habit of becoming intoxicated prior to that date, still if the defendants sold him intoxicating liquors and caused him to remain habitually intoxicated and in consequence thereof he squandered his money, etc., as charged in the declaration, that they would still be liable. We can see no error in this instruction. The appellants attempted upon the examination of their witnesses to show that the husband had been in the habit of getting intoxicated prior to this time and we think that the appellee was fully warranted in presenting an instruction upon this line.

It is also insisted that instructions 4, 5, 6 and 7 when all read together with instruction No. 1 gives the jury the right to assess damages for insanity, loss of property, habitual intoxication for an indefinite time, when under the declaration the damages that could be recovered would be for loss of support for a period of six months. Instruction 4 merely defines what is meant or embraced within the term "means of support". Instruction No. 5 defines the duties upon the part of the husband and father to support the wife and children and what may be included within that support. Instruction No. 6 advises the jury that if the defendants had sold to the husband intoxicating liquors and had caused him to become habitually intoxicated and that by reason thereof plaintiffs had lost their means of support as charged in the declaration then they should find for the plaintiffs. The seventh instruction advises the jury that the sale of intoxicating liquors to the husband was of such a character as to materially contribute to his habitual intoxication and insanity. We think that the effect of these instructions is that if the defendants had sold intoxicating liquors to the husband to such an extent as to cause him to become habitually intoxicated and to cause him to become insane by reason of which he was not able to support his family, that then they were entitled to recover for the loss of their means of support and we do not think that the instructions are susceptible of the construction given them by counsel.

Complaint is also made of instructions nine and ten. Instruction nine simply defines what is meant by "exemplary damages"; and instruction ten advises that if the

jury believe from the evidence that the husband was a habitual drunkard, and these defendants knowing him to be such sold and gave him intoxicating liquors and caused him to remain habitually intoxicated, then such sales would be regarded in law as sales wilfully and wantonly made and would authorize the jury in their sound discretion to award plaintiff exemplary damages in addition to actual damages, if any such damages have been proven. We think these instructions are correct and are sustained fully by the case of Kennedy Bros. vs. Sullivan, 136 Ill., 24.

It is further urged that the court erred in admitting the complaint of Anna Serrell whereby the husband was committed to the insane asylum. It appears from the record in this case that Anna Serrell made complaint to the County Court and procured a commission of physicians to examine Lem Odom for insanity. That the court ordered this commission and summoned physicians to act upon it and this commission found that he was insane on account of alcoholism. The complaint filed by Anna Serrell and the order of the court directing a commission to be summoned were clearly inadmissible, and while it may be true that as the finding of the commission was a matter of public record required to be kept and recorded that such would be admissible, yet it is quite clear that the complaint and other orders could not be. They were only introduced for the purpose of showing the effect that this habitual intoxication had upon the husband, besides there was other competent proof, that of the doctor and other persons, which sufficiently proved the insanity of the husband and that it was caused in their judgment from alcoholism, so

that we do not believe the appellants were in any manner injured by this testimony.

The judgments are not large, that of the widow for five hundred dollars and the children for seven hundred dollars, and it seems to us that upon a full consideration of this whole record that substantial justice has been done, and the judgments of the lower court are affirmed.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 16th *day of* March *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice.
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 157

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the ~~fifth~~ 15th day of April, A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Fred Lowrance,
Appellee

vs.

No. 42
October Term, 1917.

American Glycerin Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Crawford COUNTY

TRIAL JUDGE

HON. J. C. FAGLETON

Term No. 42 State of Illinois Ag.24.

In the Appellate Court

Fourth District

October Term, A. D. 1917.

Fred Lowrance, Appellee, vs. American Glycerin Company, a Corporation, Appellant.	Appeal from the Circuit Court of Crawford County.

McCrady, J.

It appears from the record in this case that on or about the twenty-fifth day of July 1916 the appellant hired a team of horses from the appellee to be used by the appellant in transporting nitro-glycerin from appellant's factory near Stoy, in Crawford County, Illinois to Casey, Bridgeport or Lawrenceville as the occasion should demand. The trip to Casey and back was about sixty-six miles, and appellant claims that it informed appellee that it would make this round trip in about three days.

The appellant began using the team of horses about the twenty-fifth of July, and continued to use it for about two weeks, and until the fifth day of August, at which time one of the horses died while on a return trip from Casey. The weather was very warm and it is claimed by appellant that the horse died from the excessive heat. The appellee insists, and the evidence tends to show, that for two or three days before it died the horse was not well, and during this time lagged in his work, and did not eat his feed; and that appel-

lant's driver, who was Frank Burch, after discovering that the horse was lagging in his work and not eating his feed neglected to give the horse the proper attention, but continued to work him, and while it appears that the work was not heavy, yet the heat was excessive and one of appellant's witnesses, Dr. Ridgeway a veterinary surgeon, upon cross-examination stated that if the horse had received proper treatment on Friday night that he would not have had the attack.

This case was brought before a Justice of the Peace, and appealed to the Circuit Court of Crawford County where a trial by jury was waived and the cause tried by the Court, and judgment rendered for the appellee for Two Hundred Dollars and costs.

The briefs and arguments filed by the parties in this case are quite extensive but as we think the principal question made and discussed in the case is one of fact as to whether or not the appellant as bailee used ordinary care for the horse. Counsel for appellant and appellee agree substantially upon the law controlling cases of this character, that is, that a bailee for hire is bound to use ordinary care in the preservation of the property and such care as an ordinary prudent man would bestow upon his own property, and we think that this is the correct rule and is well sustained by the authorities.

It is further contended by the appellee that when it was shown that appellant received the horse in good condition that it is his duty to return the horse in the same condition to appellee or show some legal excuse, or in other words, show that he had not been guilty of negligence in caring for the horse, and this doctrine is practically con-

[illegible]

ceded by the appellant who says in its brief: "The mere fact alone that there is no evidence of negligence on the part of the appellant will not relieve it from liability because the law places the burden of showing that it was not negligent upon appellant when a prima facie case is made out against the appellant." But it is contended by the appellant that there is abundant evidence to show that it used due care for this horse at the time in question, and the testimony especially relied upon in this particular is that of Frank Burch who was the man that drove the horse in question during all of the time that appellant had the team, and was driving him upon the day that he died, who testified that he drove him carefully and cautiously, and drove him in a walk, and watered them frequently, and that he saw nothing wrong with the horse until noon of the day that he died, and that as soon as he discovered that he was sick he called the verterinary Dr. Ridgeway, who treated the horse, but in spite of the treatment and in a short time after the veterinary was called, the horse died.

It is insisted by counsel for appellant that the evidence of Burch is sufficient and the only competent evidence to show that the horse was properly treated and cared for during the time that Burch was driving him, and it is claimed that this is not contradicted by any competent evidence and that the Court erred in admitting as appellant claims declarations of Burch just before and at the time the horse died as to the manner in which the horse had been treated. The appellant in its abstract failed to preserve any objections to the rulingsof the court upon the competency or materiality of the testimony that is now complained of. If one desires to assign as error the admission of evidence

then such should be preserved in the abstract but the abstract in this case neither discloses objections or exceptions to the evidence, and this is necessary before it can be considered by this Court. North vs. Zerwick, 97 Ill.App.306; Gibler vs. City of Mattoon, 167 Ill 22.

After a careful examination of this record we are of the opinion that appellant's contention as to the admissibility of this testimony is not well taken even if it had been preserved in the abstract in proper form.

The record discloses that upon the cross-examination of the witness Frank Burch, he was asked if he had not stated to Myers and other parties named that the horse was off of his feed and had been dragging for two or three days; that he ate all of his feed during Friday night, but Saturday morning and Saturday noon he did not eat any of his feed, to which the witness answered "no". And a question substantially the same was put to the witness as to a conversation that he had with Warnick, Dr. Ridgeway and Myers, to which the witness answered "No". After this witness had thus answered these questions upon cross-examination, counsel for appellant in redirect examination asked the witness to give the conversation that he had with these parties, which he proceeded to do, and later on the Court permitted witnesses to testify to the particular statements that the witness Burch had been inquired of and denied.

If, when Burch answered that he had had no such conversations, the matter had not been taken up by counsel for appellant and the conversation brought out by him, then we believe that the Court would not have permitted these witnesses to testify to the particular conversation as it appears that in the examination of Doctor Ridgeway the appellee sought to

bring out a conversation between him and the agent Burch, but the Court held that he was not entitled to that conversation as it was not given in the line of his duty. Later on in his cross-examination Doctor Hidgeway testified that if the horse had received proper treatment on Friday night he would not have had that attack; and further states that the horse had not received the proper treatment for a day or two.

While there was some irregularity in the admission of these contradictory statements, yet after the conversation between the witnesses Burch and Myers had been brought out by counsel for appellant, we certainly think it was then competent to show that the witness Burch had made contradictory statements in the way of impeachment.

We cannot agree with counsel for appellant in the conclusion arrived at, that these statements or declarations of Burch were admitted in evidence as part of res gestae, but were admitted as contradictions of the witness Burch, and in the view we take of it, it is not necessary to determine whether such was a part of the res gestae or not. It is insisted by counsel for appellant that the horse died from natural causes and therefore there could be no liability. The rule of law conceded by appellant is, that the burden of showing that the horse did not died as a result of the negligence of appellant's servant, and the further fact that the only testimony whereby appellant sought to relieve itself of liability under this rule and to show due care was over-whelmingly contradicted, and we cannot say that the Court was not warranted in finding that the horse died for want of due or reasonable care upon the part of the appellant's servant, and the judgment of the lower Court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 15th *day of* April *A. D. 1910*

C. C. Johnson

Clerk of the Appellate Court.

NOIN

4124

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 161

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

T. J. O'Gara et al, Trustees in Bankruptcy, etc.,
Plaintiffs in Error

vs.

No. 10.
March Term, 1918.

John Campbell,
Defendant in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 10. Agenda No.5.

March Term, A. D. 1918.

John Campbell, Defendant in Error, v. T.J.O'Gara, et al, Trustees in Bankruptcy, etc., Plaintiffs in Error.	Error to Saline.

Opinion by Higbee, J.

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This suit was brought by John Campbell against T. J. O'Gara, William Niblack and M. Weltman, as trustees in Bankruptcy for the O'Gara Coal Company, a corporation, to recover for personal injuries sustained by him while working for said company in the mine known as the O'Gara Coal Company, mine No. 10.

On March 11, 1916, the plaintiff and his buddy, Tommy Stewart, were working in the third and fourth north entries off of the fifth west entry of said mine, their working places being at the face of the coal in said entries. These entries had been driven in a distance of about fifteen hundred feet and were connected by the cross-cuts. Under the law cross-cuts are required to be driven every sixty feet in order that the air may properly circulate through the entries, and as the work advances it is also required that each cross-cut except the one nearest the face, to be closed with substantial material and made as nearly air tight as possible. On the day in question the

air traveled down the third and came back on the fourth north entry. When all the cross cuts were properly closed except the one nearest the face, the air that went through the entry would be forced down to this cross cut and would there cross over to the next entry. This would enable enough fresh air to travel down the entry past the last cross cut and to the face of the coal to dispel any gas that might accumulate at the face. The third north entry had been driven further than the fourth and a cross cut had been started from the third entry toward the fourth at a point seventy one feet from the last open cross cut. The evidence shows that this point was the extreme distance to which the air would properly circulate from the last open cross cut, and that the second cross cut from the face of the coal was closed with a canvas curtain.

The plaintiff and his buddy went to work about seven o'clock P. M. on March 10. After working a while in the third entry they went into the fourth about ten o'clock P.M., loaded six or seven cars of coal and under cut the coal in that entry to a distance of about five feet, after which they bored two holes, one next to each rib of the entry preparatory to placing the shots. These holes were about eight inches from the roof and were driven some four and one half feet into the face of the coal. It was the custom in preparing the holes for shooting to put in a tube of powder about eighteen inches long and one and one half inches in diameter, wrapped in paper to protect it from the moisture. This tube would be pushed into the hole, clay dummies inserted and a fuse attached extending out about three feet. On this occasion after the powder had been inserted in the holes, it became necessary for the buddy of

plaintiff to go for more dummies. He was gone about ten minutes. Almost immediately upon his return an explosion occurred by which the plaintiff was severely injured.

It was the contention of the plaintiff that the curtain over the second cross cut from the face of the coal was torn, which caused the air to be short circuited and that enough air did not reach the face of the coal to drive away the gas which had been released by undercutting the coal and boring the holes; that when his buddy returned the gas which had thus accumulated near the roof of the entry by reason of the failure of the air to circulate at the face was ignited by the lamp which he wore on his cap and that this caused the gas to burn or explode; that plaintiff and his buddy threw themselves to the ground and the explosion passed over them. Plaintiff stated that when he raised his head he saw that the paper around the powder and fuse in one of the holes was burning and that there would be an instant explosion unless this fire could be extinguished which he attempted to do by grasping it with his hand but that he was too late and received the full force of the blast in his face and chest. Defendant contended that plaintiff and his buddy used different size bits in boring the holes, that the cartridge became caught in the right hand hole and the plaintiff struck it with a steel tamper which caused it to explode.

The declaration consisted of six counts. The first count charged that the entry had been driven more than sixty feet beyond the last open cross cut; that by reason thereof the air did not travel to the face, and the gas accumulated and caused the explosion. The second count charged the failure to mark the dangerous condition, consisting of an

[illegible]

accumulation of gas. The third count charged a failure to make a record of the dangerous conditions. The fourth was a common law count, charging a failure to exercise reasonable care to furnish the plaintiff a reasonably safe place in which to work. The fifth count charged a failure to close the last five open cross cuts and make substantial stoppings, and the sixth a failure to close the cross cuts next to the last open cross cut with substantial stoppings and the use of canvas curtains for that purpose which had holes in them. To all these counts the defendants filed a plea of general issue. The case was tried before a jury and a verdict returned for nine thousand dollars for which judgment was rendered in favor of plaintiff and against the defendants to be paid in due course of administration. Defendants below have brought the record here for review by writ of error.

No complaint is made that the trial court committed any error in its rulings on the evidence or in the giving or refusing of instructions or that the verdict is excessive. Hence the only question to be considered by this court and the only one discussed by counsel is whether the facts in proof constitute a cause of action. Defendant in error and his buddy, Tommy Stewart testified that they had been troubled with gas in these two entries all the time, more or less, Stewart further testified that the air did not circulate at the face of the coal and there were no danger marks around the curtain nor at the face of the coal; also that about midnight he burned out the gas in this entry. Between that time and 3:45 A.M. when the explosion occurred, the mine examiner as he states, examined this entry and found no gas but he had with him no

anemometer without which he stated he could not determine the amount of air at the face of the coal. This examiner further testified that he knew this entry at different times had made gas; that if the air did not circulate at the face of the coal when gas was generating it would accumulate there; that the undercutting of the coal and the boring of the holes would liberate the gas if there was any in that particular region, and that the undercutting had not been done nor the holes bored at the time he was in these entries. He further testified that he had noticed a hole in the curtain in the second cross cut; that the hole extended the full length of the curtain, that the curtain was in that condition for two or three mornings before that time; that he knew a hole of that kind in that place would short circuit xx the air and prevent the proper amount of air circulating at the face of the coal and that he told the mine manager of this condition either one or two days before the accident. The examiner gave his reason for not marking this curtain as unsafe that "the only thing we mark on is where there is a bad roof in a place or gas". Other witnesses testified as to the hole or tear in this curtain and there appears to be no doubt that such condition had existed for several days. This was clearly such a dangerous condition as under the statute should have been marked by the examiner. The Supreme Court in the case of Mengelkamp v. Consolidated Coal Co.,259 Ill.305, said, "We have held that the words 'any dangerous condition' in the xxx mining act apply to dangerous conditions in the track, the road bed or the sides of the entry, and that they include any dangerous condition which may exist in the coal mine which endanger the life,limb or health of men working in the mine, whether such conditions are of a permanent

character due to faulty construction or of a temporary character due to operation". To the same effect are the cases of Mertens v. Southern Coal Co.,235 Ill.540 and Dunham v. Black Diamond Coal Co.,239 Ill.457.

On behalf of plaintiffs in error, a witness, Meyers testified he was present in the fourth entry at the time of the accident and that the explosion was caused by defendant in error striking the cartridge with the steel end of a tamper and the fact that this witness's hair and eyebrows were shinged tends to prove that he was in the near vicinity at the time of the explosion. On theother hand two witnesses testified Meyers said in their presence that at the time the accident happened he was back in a car asleep and that he did not know how it occurred. It is not clear from the proof whether the car referred to was in the first or second cross cut. If in the first cross cut it was about seventy feet from the place of the explosion or if in the second cross cut about one hundred and thirty feet. Both defendant in error and Stewart denied that Meyers was in the entry at the time of the explosion. The testimony of Meyers is weakened somewhat by proof that it was nearly two hours after the accident before he brought help to plaintiff in error and Stewart.

It was the province of the jury to determine the credibility of the witnesses and we are not disposed to question the conclusion reached by them. As the facts supported the verdict of the jury and no other question is presented for our determination, the judgment of the trial court will be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th *day of* August *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

4126

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

211 I.A. 169

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

The Farmers National Bank of Allendale, Defendant in Error

vs.

No. 24

March Term, 1918.

Melchoir Leipold et al, Plaintiffs in Error

ERROR TO

~~APPEAL FROM~~

Circuit COURT

Wabash COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 24. Agenda No.17.

March Term, A. D. 1918.

The Farmers National Bank of Allendale, Defendant in Error v. Melchoir Leipold, et al, Plaintiffs in Error.	Error to Wabash.

Opinion by Higbee, J.

---oCo---

This was an action of assumpsit in the circuit court of Wabash county to the November term, A.D.1915, in which The Farmers National Bank of Allendale was plaintiff, and George S. Clarke and Melchoir Leipold were defendants.

The declaration was as follows: "The Farmers National Bank of Allendale, a corporation by Kolb and White, its attorneys, complains of Melchoir Leipold and George S. Clarke, defendants of a plea of trespass on the cases on promises:

For that whereas the said defendant, Melchoir Leipold, on the 28th day of February, 1914, in the county aforesaid, made his promissory note and delivered the same to said defendant George S. Clarke, and thereby then and there promised to pay four months after date thereof, to the order of the said George S. Clarke at the American National Bank in Mount Carmel, Illinois, the sum of two thousand dollars ($2,000), for value received, with interest on the said sum, from the date of the said note, at the rate of seven per cent per annum; and the said George S. Clarke

Term No. 24. Agenda No.17.

Bench Term, A. D. 1918.

The Farmers National Bank of Allendale,
Defendant in error,

v.

Melchoir Leipold, et al,
Plaintiffs in error.

Error to Cook.

Opinion by Judge , J.

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This was an action of assumpsit in the circuit court of Kenosh county to the overall for , A.D. 1918, in which The Farmers National Bank of Allendale was plaintiff, and George A. Clarke and Melchoir Leipold were defendants.

The declaration was as follows: The Farmers National Bank of Allendale, a corporation by [illegible] its treasurer, complains [illegible] George A. Clarke, defendants of a plea of trespass on promises:

For [illegible] and [illegible], also Melchoir Leipold, on the 26th day of February, [illegible], in a certain [illegible] made [illegible] promissory note [illegible] to the said defendant [illegible] and there promised to pay [illegible] order of the said [illegible] bank in [illegible] dollars ($2,[illegible]) for value [illegible] said sum, from the date of the note [illegible] seven per cent per annum; and the said [illegible]

thereupon then and there, to wit, at the time and place first aforesaid, assigned the said note, by indorsement thereon under his hand, to the said plaintiff; by means whereof the defendants then and there became liable to pay the plaintiff the amount of the said note, according to the tenor and effect thereof; and being so liable the defendants, in consideration thereof, then and there promised the plaintiff to pay it the said amount, according to the tenor and effect of the said note.

Yet, although the day of payment in the said note specified has elapsed, the defendants have not paid to the plaintiff the amount of said note, or any part thereof, except the sum of nine hundred thirty five dollars ($935.00) on the principal of said note, and the interest accrued thereon to the date of September first, 1915, and although often requested to pay the balance due on said note, the said defendants have wholly neglected and refused to pay the same--to the damage of the plaintiff of fifteen hundred dollars ($1,500) and therefore it brings its suit, etc." The following copy of a promissory note was also filed with the declaration.

'No. 160 . Mt.Carmel,Ill.,Feby.,28th,1914. $2000.00

On or before four months after date, for value received, we or either of us promise to pay to the order of Geo.S. Clarke, the sum of two thousand 00/100 Dollars.

Payable at AMERICAN NATIONAL BANK,MT.CARMEL,ILL.

And to secure the payment of the said amount, we hereby authorize and empower any attorney at law of the state of Illinois to appear before any court of record, in term time, or in vacation, at any time hereafter and confess judgment for the above mentioned sum and seven per cent from date and ten per cent of the face of this note as attorney fee, and to release all errors, waive all proceedings in the nature of a stay of execution, appeal or petition in error.

thereupon then and there, to wit, at the time and place first aforesaid, assigned the said note, by indorsement thereon under his hand, to the said plaintiff; by means whereof the defendants then and there became liable to pay the plaintiff the amount of the said note, according to the tenor and effect thereof; and being so liable the defendants, in consideration thereof, then and there promised the plaintiff to pay it the said amount, according to the tenor and effect of the said note.

[illegible], although the day of payment of the said note specified has elapsed, the defendants have [illegible] to the plaintiff the amount of said note, or any part thereof, except the sum of nine hundred [illegible] ($[illegible]) on the principal of said note, and the interest on such thereon to the date of [illegible] hereof, [illegible] requested to pay the balance due [illegible], but [illegible] defendants have wholly neglected and refused to pay the same to the damage of the said [illegible] ($[illegible]) and therefore it [illegible] following copy [illegible] the declaration.

[illegible]

[illegible] authorize and empower any [illegible] attorney at law of the state of Illinois to appear [illegible] court, in term time, or in vacation, at any time hereafter and confess judgment for the above [illegible] and ten per cent of the face of this note [illegible] attorney fee, and to release all errors, waive all rights of appeal, stay of execution, appeal or petition in error.

The endorsers, signers and guarantors severally waive presentment for payment, protest or notice of protest and notice of non-payment of this note, and diligence in bringing suit against any party to this note, and sureties agree that time of payment may be extended without notice or other consent.

----------(Seal)

Melchoir Leipold (Seal)

----------(Seal)

On the back of the copy of the note was the indorsement of the name George S. Clarke also payments on the principal amounting to $1005 and of interest to September 1, 1915.

At said term of court, to wit, on November 22, 1915 the following judgment was entered:

"And now on this day come again the parties of this suit, by their attorneys, into open court; the court now, after hearing the evidence offered finds the amount of principal and interest due on the note to be $1,081.83. Whereupon the court enters judgment on finding in favor of the plaintiff and against the defendants, for the sum of $1081.83 and costs of suit".

George S. Clarke one of the defendants bring the case into this court by writ of error. Two questions are raised by the assignment of error and argument in this case, viz: was the declaration sufficient to support the judgment, and was the judgment in proper form?

The record in this case and the questions raised are substantially the same as in the case of Feen v. Melchoir Leipold, George S. Clarke (the defendants in this case) and another. What was said in the opinion filed at this term in that case applies equally to this case and by the same reasoning the judgment in this case must be affirmed.

Judgment affirmed.

Not to be reported in full.

The endorsers, signers and guarantors severally waive presentment for payment, protest or notice of protest and notice of non-payment of this note, and diligence in bringing suit against any party to this note, and further give that time of payment may be extended without notice or other consent.

[illegible]

[illegible]

[illegible]

In the [illegible] of the [illegible] in-
dorsement of the same [illegible] are [illegible] on the
principal amounting to [illegible] and of interest to [illegible],
1919.

[illegible]

1919 the following judgment was rendered:

"This day on this day came again the parties of this
suit, by their attorneys, and upon [illegible] the court [illegible]
after hearing the evidence offered [illegible] the [illegible] in-
structions and argument [illegible] be [illegible]. Whereupon
the court [illegible] [illegible] [illegible] [illegible]
and upholds the [illegible], [illegible] [illegible] are [illegible]
of [illegible].

[illegible]

[illegible] by the [illegible] [illegible] [illegible]
by the [illegible] [illegible] [illegible], what
was the [illegible] [illegible] [illegible] [illegible] and
was the judgment [illegible].

The [illegible] [illegible]
are [illegible] [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] and
[illegible]. [illegible] [illegible] [illegible]
that [illegible] [illegible] [illegible] [illegible]
[illegible] the judgment in [illegible] [illegible]

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* August *A. D. 191*8.

Clerk of the Appellate Court.

NOIN

4128

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 175

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Louis H. Gieseman,
Appellee

vs.

No. 30.
March Term, 1918.

Illinois Terminal Railroad Company,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 30. Agenda No.32.

March Term, A. D. 1918.

Louis H. Gieseman, Appellee	
v.	Appeal from Madison.
Illinois Terminal Railroad Company, Appellant	

Opinion by Higbee, J.

---oOo---

This is an appeal by the Illinois Terminal Railraod Company, from a judgment recovered against it by Louis H. Gieseman in the circuit court of Madison county, for the sum of $975.

The first of the two counts of the declaration alleged that on August 20, 1915, appellee was the owner and in possession of a farm containing 240 acres of land in Madison county, Illinois; that prior to said date, appellant built its railroad across Cahokia creek valley west of and down stream from appellee's farm; that in doing so said appellant filled up and totally closed the natural channel of Cahokia creek where it was crossed by said railroad and constructed a solid embankment across the same and entirely closed the former natural channel of said creek; that said appellant dug an artificial channel for said creek about 400 feet south and east of the former natural channel; that said appellant negligently constructed and left as the sole channel or opening in said embankment for all the waters coming down said valley, a concrete opening of wholly insufficient size and width; that on said date heavy rain

Term No. 30. Agenda No. 32.

March Term, A. D. 1910.

Louis H. Gleesman, Appellee v. Illinois Terminal Railroad Company, Appellant	Appeal from Madison.

Opinion by Higbee, J.

---oOo---

This is an appeal by the Illinois Terminal Railroad Company, from a judgment recovered against it by Louis H. Gleesman in the circuit court of Madison county, for the sum of $[illegible].

The first of the two counts of the declaration alleged that on August [illegible], 1908, appellee was the owner and in possession of a farm containing [illegible] acres of land in Madison county, Illinois; that prior to said date, appellant built its railroad across Canoka creek valley west of and down stream from appellee's farm; that [illegible] said appellant filled up one totally closed the natural channel of Canoka creek where it was crossed by [illegible] and constructed a solid embankment across the [illegible] totally closed the former natural channel of said creek; that said appellant dug an artificial channel [illegible] 400 feet south and east of the former natural channel; that said appellant negligently [illegible] said [illegible] the solid channel or channels [illegible] the water coming down said valley, [illegible] of sufficient size and width [illegible] said [illegible] rain

storms occurred and the waters naturally flowing down said creek or valley were obstructed and prevented from flowing away by said embankment and on account thereof, said waters accumulated and flowed against said embankment to the depth of 15 feet and were held back up stream upon appellee's lands and flooded, damaged and destroyed a large amount of his farm crops, to wit, 40 acres of blue grass pasture, 10 acres of hay, 30 acres of growing corn, 20 acres of wheat in shock, 20 acres of clover, 7 acres of corn and also destroyed a large amount of fencing. The second count contains substantially the same general averments as the first, but alleges that the damages complained of were occasioned by heavy rain storms which occurred on August 13, 1916 and that said damages consisted of the destruction of 40 acres of blue grass pasture and 42 acres of growing corn.

To this declaration appellant filed the general issue and three special pleas, averring in the first that in the construction of its work, due care and diligence was used to avoid obstruction and interference with the natural flow of the water in Cahokia creek valley, and for that purpose certain culverts, openings and bridges were constructed; that in doing said work, appellant created a permanent and lawful structure, so that any damages, if damage was caused thereby, was a permanent damage and injury to said land on the 20th day of September,1911 and that therefore the causes of action mentioned in the declaration did not accrue within five years next before the commencement of the suit. The second was the usual plea of the statuteof limitations, alleging that appellee's cause of action did not accrue at any time within five years

storms occurred and the waters rushing down the
creek or valley were obstructed and prevented from flowing
away by land embankment and on account thereof, said waters
accumulated and flowed against said embankment to the depth
of 15 feet and were held back up stream upon appellees'
lands and flooded, damaged and destroyed a large amount of
his farm crops, to wit, 40 acres of corn, three pastures, 10
acres of hay, 30 acres of growing oats, 20 acres of wheat
in shock, 20 acres of clover, 7 acres of [illegible]
stroyed a large amount of fencing. The evidence sustain ap-
tains substantially the above general averments of the first,
but allege that the damages complained of were occasioned
by heavy rain storms which occurred on August 1, 1918 and
that said damages resulted from the destruction of 40 acres
of corn, [illegible] and 40 acres of grass [illegible].

To this such action appellant filed the general
issue and three special pleas, averring in the first that
in the construction of the work, no more earth, gravel
was used than should obstruct and interfere with the
natural flow of the water in the Sugar Creek valley, and
for that reason certain [illegible] were
were constructed; that [illegible]
created a [illegible] and [illegible]
age, if damage was caused thereby, [illegible]
and injury to said land in the [illegible]
and that therefore the [illegible]
declaration did not [illegible]
the commencement of the [illegible]
plea of the statute of limitations, [illegible]
cause of action did not accrue at [illegible]

before the bringing of the suit and the third relied on the alleged fact that the injury was permanent at the time of the construction of the work complained of and was in many respects similar to the first.

The pleadings and the evidence in this case are in all important respects similar to the same in the cases of Albert Drda, Henry F.C.Dettmer and W.C.Nivins against the same company which is appellant herein which cases opinions were filed by this court at the March term,1918. The opinions in those cases to which reference is made fully express our views concerning the general questions arising upon the law and the evidence in this case, as well as in the several cases to which they particularly apply.

In accordance with our views as expressed in said opinions and under the proof adduced in this case, appellee was entitled to a recovery and as the facts seem to justify the amount of damages found by the jury, the verdict should not be disturbed. The judgment of the court below which is in accordance with such verdict will accordingly be affirmed.

Affirmed.

Not to be reported in full.

before the bringing of the suit and the rules relied on the alleged fact that the injury was permanent at the time of the construction of the work complained of and was in many respects similar to the first.

The pleadings and the evidence in this case are in all important respects similar to the case in the cases of Albert Dodge, Henry J. Gettemeier and [illegible] against the same company which is appellant herein which cases opinions were filed by this court at the March term, 1910. The opinions in those cases to which reference is made fully express our views concerning the general questions existing upon the law and the evidence in this case, as well as in the several cases in which they particularly apply.

In accordance with our views as expressed in said opinions and under the proof adduced in this case, appellee was entitled to a recovery and as the trial judge in justify the amount of damages found by the jury, the verdict should not be disturbed. The judgment of the court below which is in accordance with such verdict was correctly rendered and must be affirmed.

Affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th *day of* August *A. D. 191*8

C. C. Johnson

Clerk of the Appellate Court.

NOIN

4129

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

211 I.A. 176

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Elizabeth Poland et al,
Appellees

vs.

No. 48.
March Term, 1918.

Supreme Tribe of Ben Hur,
Appellant

ERROR TO
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. J. C. MC BRIDE

Term No. 48. Agenda No.14

March Term, A. D. 1918.

Elizabeth Poland, et al, Appellees	)	
v.	)	Appeal from Fayette.
Supreme Tribe of Ben Hur, Appellant.	)	

Opinion by Higbee, J.

---oOo---

This suit was brought to the August, 1916, term of the circuit court of Fayette county, by Elizabeth Poland and John H. Sperry to recover on a life insurance policy for $1000 issued by the Supreme Tribe of Ben Hur to Theodore J. Sperry, in which plaintiffs were named as beneficiaries.

The declaration consisted of one count and is in the usual form in such cases. To this declaration a plea of general issue and seven special pleas were filed. Demurrer was sustained to the first, second, fourth and seventh special pleas and the third special plea was withdrawn. Appellant elected to stand by the fourth special plea and amended the seventh. The fifth special plea sets up that the certificate of beneficial membership sued upon provided that the amount thereof should be payable only upon condition that such beneficial member should have in every way complied with the laws, rules and regulations of the association then in force or which thereafter might at any time be adopted. Section 101 of the by-laws which was set out in full isin part as follows: "No benefit shall be paid ------ (3) on account, or in consequence of or as a result of the

March Term, A. D. 1918.

Elizabeth Poland, et al, Appellees	
v.	Appeal from Fayette.
Supreme Tribe of Ben Hur, Appellant.	

Opinion by Hughes, J.

---oOo---

This suit was brought in the August, 1916, term of the circuit court of Fayette county, by Elizabeth Poland and John M. Sperry to recover on a life insurance policy for $1000 issued by the Supreme Tribe of Ben Hur to Theodore J. Sperry, in which plaintiffs were named as beneficiaries.

The declaration consisted of one count and is in the usual form in such cases. To this declaration a plea of general issue and seven special pleas were filed. Counsel was sustained to the first, second, fourth and seventh special pleas and the third special plea was withdrawn. Appellant elected to stand by the fourth special plea and amended the seventh. The first special plea sets up that the certificate of beneficial membership was upon provided that the amount thereof should be payable on, upon condition that such beneficial member should in every way complied with the laws, rules and regulations of the association then in force or which thereafter might at any time be adopted. Section 107 of the by-laws which was set out in full has put as follows: "No benefit shall be paid ------ (3) on account, or in consequence of or as a result of the

intemperate use of intoxicating liquors-------(5) or on account of or in consequence of, or as a result of the violation by any such member of any ordinance of any city, or town, or of any law, either civil or criminal, of any state, territory, province or country in which such member may be, which violation of ordinance or law is the proximate cause of such death or disability-------". The plea then avers that Sperry's death occurred on account of, in consequence of, or as a result of the intemperate use of intoxicating liquors by him, and that on the twenty-eighth day of January, 1916 he intemperately used intoxicating liquors, and as a result of such use, died on January 28th, or the day following, and therefore no benefit was payable under said certificate. The sixth special plea set forth the following provision of said section 101: "No benefit shall be paid on account of the death of a member which death occurred on account of or in consequence, or as the result of the intemperate use of intoxicating liquor" and alleged that Sperry's death occurred on account of or in consequence of or as the result of the intemperate use of intoxicating liquors by him, and that therefore no benefit was payable on account of his death to the plaintiffs. The seventh special plea which is somewhat similar to the fifth, set out section 101 of the by-laws of the association and averred that the death of Sperry followed a violation of the statutes providing that any intoxicated person found in a street, highway or other public place should be fined, in this that Sperry became and was intoxicated upon the streets of the city of Ramsey, and upon the highways of Fayette county, and his death would not have occurred except for the violation of such statute, and that, therefore, no benefit

is payable on account of his death.

The trial resulted in a verdict in favor of plaintiffs for $1000, the face of the policy, and the defendant has appealed from the judgment rendered on that verdict. Appellant is a fraternal beneficial association operating under the lodge system and writing mutual insurance on the assessment plan. The local lodges are known as "courts" and Theodore J. Sperry was a member of the court located at Ramsey, Illinois. On January 28, 1916, the insured was in Ramsey and about ten o'clock A.M. voted at an election there being held. He did not return to his home which was about a mile north of Ramsey and parties who went in search of him that night failed to find him, but did find his cap on a wire cross fence about half way between Ramsey and his home. His body was discovered next morning about three hundred yards from the place where his cap had been found. There was some proof tending to show that a small bottle of whisky was found on or near the body. An inquest was held and a coroner's jury returned a verdict finding the deceased came to his death from "exposure by being under the influence of alcohol". A certified copy of this verdict was attached to the proofs of death furnished appellant by appellees.

The first contention of appellant is that the proof showed deceased came to his death as a result of the intemperate use of intoxicating liquor, which if true, constituted a violation of a condition of the policy and would prevent a recovery on the same. The burden of proof was upon appellant to show that the deceased did so come to his death in order that it might avail itselfof this defense. Knights Templars' Indemnity Co. v. Crayton, 209 Ill.550;

is payable on account of his death.

The trial resulted in a verdict in favor of plaintiffs for $1000, the face of the policy, and the defendant has appealed from the judgment rendered on that verdict. A[illegible] is a fraternal benefitial association operating under the lodge system and writing mutual insurance on the assessment plan. The local lodges are known as "courts" and Theodore [illegible] Purdy was a member of the court located at Romeo, Illinois. [illegible] 1918, the insured was in Romeo and about ten o'clock [illegible] . voted at an election there being held. [illegible] his home which was about a mile north of Romeo and [illegible] who went in search of him but night fell before [illegible], but did find his car on a [illegible] road about half way between Romeo and his home. His body was discovered next morning about three hundred yards from the place where his car had been found. There was some proof tending to show that a small rubber [illegible] was found [illegible] the body. An inquest was held [illegible] verdict finding the deceased [illegible] "accidentally by being under the influence of [illegible]" [illegible] this verdict was [illegible] death [illegible] appellant by specification.

The first [illegible] of [illegible] the proof showed [illegible] the intoxicating [illegible] constituted a [illegible] accident [illegible] upon appellant to show that the [illegible] death in order that it might avoid liability [illegible] Knights Ten Lord Insurance Co. v. Clayton, 2 S [illegible] ;

Supreme Tent Knights of Maccabees, v. Stensland, 206 Id.124. Nine witnesses in behalf of appellees testified they saw the deceased various times between ten thirty and twelve o'clock on the forenoon of January 28 and he did not appear to them to be intoxicated. Some of these witnesses also testified as did several others, that he was not in the habit of becoming intoxicated so far as they knew. As against this evidence one witness for appellant testified to taking a drink with the deceased about eleven o'clock in the morning of January 28, out of a six or eight ounce bottle which was about half full after they drank out of it. Another testified to finding with the body of deceased a small bottle of something that looked like whiskey. Still another testified to seeing deceased during the noon hour of that day reeling and stumbling around and he "took him to be in an intoxicated condition". Some of the witnesses for appellees saw the deceased as he was leaving town in the direction of his home with a sack upon his back. The question of whether deceased's death was due to the intemperate use of intoxicating liquor, was a question of fact to be determined by the jury and there is evidence in the record fairly tending to support the verdict. Under such circumstances especially in view of the fact that the burden of proof was cast upon appellant the verdict of the jury should not be disregarded. Rice v. Warner Hotel Co.,201 Ill.App.530.

Appellant also urges as error, the admisson of evidence as to the deceased's habits of using intoxicating liquors insisting that the sole question was whether deceased came to his death by reason of the intemperate use of intoxicating liquors on the 28th day of January, 1916. While the probative force of this evidence may be questioned

Supreme Tent Knights of Maccabees, v. Stensland, 206 Id.102.

Nine witnesses in behalf of appellee testified they saw the deceased various times between ten thirty and twelve o'clock on the forenoon of January 23 and he did not appear to them to be intoxicated. Some of these witnesses also testified as did several others, that he was not in the habit of becoming intoxicated so far as they knew. As against this evidence one witness for appellant testified to taking a drink with the deceased about eleven o'clock in the morning of January 23, but it was six or eight ounces bottle which was about half full after they drank out of it. Another testified to finding with the body of deceased a small bottle of something that looked like whiskey. Still another testified to seeing deceased during the noon hour of that day reeling and stumbling around and he "took him to be in an intoxicated condition". One of the witnesses for appellees saw the deceased on the w s leaving town in the direction of his home with a sack upon his back. The question of whether deceased's death was due to the inappropriate use of intoxicating liquor, was a question of fact to be determined by the jury and there is evidence in the record fairly tending to support the verdict. Under such circumstances especially in view of the fact that the burden of proof was cast upon appellant the verdict of the jury cannot be disregarded. Rice v. Warner Hotel Co., 201 Ill.App.[illegible].

Appellant also urges as error, the exclusion of evidence as to the deceased's habits of using intoxicating liquors inasmuch that the sole question was whether deceased came to his death by reason of the intemperate use of intoxicating liquors on the 23th day of January, 1916. While the probative force of this evidence may be questioned

it was not error to admit it. The fact that the deceased had not been formerly addicted to the intemperate use of intoxicating liquor, would tend to show that he was less likely to indulge in its intemperate use on January 28. It would also appear to have been particularly admissible to meet the allegations contained in appellants sixth plea, which charges generally that the death of Sperry was the result of the intemperate use of intoxicating liquors by him. Counsel for appellant also insists that the first and second instructions given for appellees were erroneous in that they advised the jury that the burden rested upon appellant to prove that the deceased came to his death by reason of the intemperate use of intoxicating liquor. This is a correct statement of the law as laid down by thecases of Knights Templars Indemnity Co. v. Crayton and Supreme Tent Knights of Maccabees of the World v. Stensland, supra. It is insisted by counsel for appellant however, that this burden shifted to appellees, when they introduced in evidence the proofs of death which they had submitted to appellant and which contained the verdict of the coroner's jury that the deceased came to his death "from exposure by being under the influence of alcohol". The cases last referred to expressly hold the fact that the proofs of death in those cases tended to show that the death was suicidal did not change the rule or shift the burden. It only was necessary for appellees in order to make out a case under their declaration to show that they had submitted to appellant proofs of death and the fact that these proofs tended to show that death resulted from the intemperate use of intoxicating liquor, did not change the rule or shift the burden in this case. Appellant is not in any position, however, to raise

it was not error to admit it. The fact that the deceased had not been formerly addicted to the intemperate use of intoxicating liquor, would tend to show that he was less likely to indulge in its intemperate use on January 22. It would also appear to have been particularly admissible to meet the allegations contained in complainants pleas, which charge generally that the death of Perry was the result of the intemperate use of intoxicating liquors by him. Counsel for appellant also insists that the first and second instructions given for appellees were erroneous in that they advised the jury that the burden rested upon appellant to prove that the deceased came to his death by reason of the intemperate use of intoxicating liquor. This is a correct statement of the law as laid down by decisions of Indiana Supreme Court. See, e.g., Crystal and Greene Vent Mining Co. v. Anderson et al. v. Greenlund, supra. It is insisted by counsel for appellant however, that this burden shifted to appellees, when they introduced in evidence the proofs of death which they had submitted to appellant and which constituted the verdict of the coroner's jury that the deceased died "in the usual way, presumably by being under the influence of alcohol". The same court mentioned in expressly held the fact that the proofs of death in those cases tended to show that the death in question did not change the rule as which the burden. It only was necessary for appellees in order to make out a case under their defense instruction to show that they had submitted to a coroner proofs of death and that at that time proofs showed or were that death resulted from the intemperate use of intoxicating liquor, did not change the rule as which the burden in this case. Appellant is not in any position, however, to raise

this question for the reason that its instruction Numbered 3A contained in substance the same proposition of law. A party cannot complain of the giving of an instruction where the same principle is embodied in an instruction given at his own instance. Fox v. Chicago & Alton R.R.Co. 188 Ill. App.11. The refusal of the court to give three instructions offered by appellant is also assigned as error. These instructions, however, so far as proper, were fully covered by other instructions given by appellant and it was not reversible error to refuse them. No sufficient reason appears from the record for reversing the judgment in this case and the same will accordingly be affirmed.

Affirmed.

Justice McBride took no part in consideration & decision of this case in this Court.

Not to be reported in full.

this question for the reason that the instruction numbered 34 contained in substance the same proposition of law. A party cannot complain of the giving of an instruction where the same principle is made law in another instruction given at his own instance. For a similar reason, the fifth, sixth, eighth, and twelfth of the court's five direct instructions objected by appellant in case contained no error. These instructions, however, so far as proper, are fully covered by other instructions given by appellant and it was not reversible error to refuse them. To substantial reason appears from the record for reversing the judgment in this case and it is ~~hereby~~ will accordingly be affirmed.

Affirmed.

Justice Curtis took no part in the decision of this case in trial court.

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 17th *day of* August *A. D. 191*8.

C. C. Johnson

Clerk of the Appellate Court.

NOIN

4132

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

211 I.A. 194

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Peerless Pattern Company,
Appellant

vs.

No. 17
March Term, 1918.

Silverbloom Dry Goods Co.,
Appellee

~~ERROR TO~~
APPEAL FROM

County COURT

Madison COUNTY

TRIAL JUDGE

HON. HENRY B. EATON

Term No. 17. In the Appellate Court, Agenda No.3.

Fourth District.

March Term A. D. 1918.

Peerless Pattern Company, Appellant. vs. Silverbloom Dry Goods Co., Appellee.	Appeal from the county court of Madison County.

McBride, J.

On the first day of August 1910 the appellee executed a written order and delivered the same to appellant, which was accepted by appellant, and provided for the shipping by appellant to appellee of an assortment of Peerless Patterns for which appellee agreed to pay nine cents for each pattern. It was provided by such contract that the patterns were to be shipped by appellant to appellee from time to time and that such of the patterns as were not sold by appellee were to be returned and were to be credited to appellee at the full purchase price and appellee was to pay for all goods on or before the 10th day of the month following the month of shipment, together with transportation charges. The order contained the following clauses: "Item 7.-This order is to take effect on acceptance by you and to remain in force for a term of five years from the date of first shipment to us and from term to term thereafter unless either party shall give notice of desire to cancel, in writing, within thirty days before the expiration of any term. If such notice is given by us we will continue the agreement for four months thereafter in order to give you an opportunity to transfer the account."

Term No. 17. In the Appellate Court, Second No. 2.

Fourth District.

March Term ... ... 1926.

Peerless Pattern Company, Appellant.	
vs.	Appeal from the County Court of Dallas County.
Riverbloom Dry Goods Co., Appellee.	

Opinion, J.

On the first day of August, 1925, the appellee executed a written order and delivered it to the appellant, which was accepted by appellant, and provided for the shipping by appellant to appellee of a certain number of Peerless patterns for which appellee agreed to pay nine cents for each pattern. It was provided by said contract that the patterns were to be billed by appellant to appellee from time to time and that such of the patterns as were not sold by appellee were to be returned and appellee was to be credited to appellee at the full amount billed and appellee was to pay for all patterns not so returned the 15th day of the month following the month of shipment, including with transportation charges. The order contained the following clauses: "Item V.-This order is to be held as an acceptance by you and to remain in force for a term of ... years from the date of first shipment to us and is to be in force thereafter unless either party gives ... to cancel, in writing, within ... days after the cancellation of my term. If such notice is given by you we will continue the agreement for four more ... in order to give you an opportunity to transfer the account."

"Item 8.- When this agreement is terminated, as herein provided, all conditions having been lived up to by us, live patterns in good salable condition may be returned by us at full purchase price in payment of the above mentioned standing debit".

Upon the delivery of this order patterns were shipped by appellant to appellee from time to time and payments made thereon for five years. Prior to the expiration of the contract and in conformity with its terms, the appellee gave appellant notice of the desire to cancel it and would not renew it for another term. The contract, under its terms, was then continued for four months, shipments and payments made as before. Upon the expiration of four months the witness for appellant testified that they packed thepatterns on hand in bundles of fifty and had them ready for shipment and wrote appellant asking it where they desired the patterns to be shipped. The only witness examined was Lewis Blumberg, one of the members of the firm of appellee, and he stated that the amount actually due on January 1, 1916 was $94.73, and that they had patterns on hand that were live and salable patterns and such as appear in appellant's catalogue, sufficient in number to cover that balance; that they notified appellant that the patterns were ready for shipment and asked them to direct where they desired them to be shipped to. The appellant made no reply to this and other letters to the same effect and never made any demand upon the appellee for the payment of the amount claimed due except by the bringing of this suit.

The pleadings in this case consisted of the common counts, to which an affidavit of merits was attached, and a plea of general issue which was not sworn to.

Upon a hearing of the case the court found the issues for the defendant and rendered judgment against the plaintiff for costs, to reverse which judgment this appeal is prosecuted.

The appellant in its argument relies upon two questions for a reversal of this judgment. The first is, that the trial court should have entered a judgment in its favor because it filed with its declaration an affidavit of merits, and that the appellee failed to file a sworn plea as required by statute.

It is true it appears from the pleadings in this case that the plea of the defendant was not sworn to but the plaintiff and defendant proceeded to trial upon the issue framed upon the declaration and plea as filed. If the appellant had desired to take any benefit of the failure to file a sworn plea it should have moved for judgment or taken proper steps to have stricken the plea from the files but it did not do this. Instead it proceeded to trial upon the pleadings as framed. This question was not made before the trial court and the trial court never had any opportunity to pass upon it and it is too late to make this objection in this court for the first time. We also believe that by going to trial the verification of the plea was waived. Terhune vs. Weston, 69 App.,249; McWilliams vs. Richland, 16 App.,333.

It is next insisted by counsel for appellant that it was the duty of the appellee to return the patterns within a reasonable time after the termination of the contract, and that as about eighteen months had elapsed and appellee had not actually returned the patterns that it was now too late for appellee to take credit therefor and that the title of the goods had vested in the appellee. We agree with the contention of counsel for appellant that it was the duty of the

Upon a hearing of the case the court found the issues for the defendant and rendered judgment against the plaintiff for costs, to reverse which judgment this appeal is prosecuted.

The appellant in its argument relies upon two questions for a reversal of this judgment. The first is, that the trial court should have entered a judgment in its favor because it filed with its declaration an affidavit of merits, and that the appellee failed to file a sworn plea as required by statute.

It is true it appears from the pleadings in this case that the plea of the defendant was not sworn to but the plaintiff and defendant proceeded to trial upon the issues framed upon the declaration and plea as filed. If the appellant had desired to take any benefit of the failure to file a sworn plea it should have moved for judgment or taken proper steps to have stricken the plea from the files but it did not do this. Instead they proceeded to trial upon the pleadings as framed. The question was put to before the trial court and the trial court never had any opportunity to pass upon it and it is too late to make this objection in this court for the first time. We also believe that by going to trial the verification of the plea was waived. Williams vs. Weston, 55 Ark., 152; Williams vs. Mechanics, 4 App., 233.

It is more insisted by counsel for appellant that it was the duty of the appellee to return the writ within a reasonable time after the beginning of the contract, and that as about eighteen months had passed and appellee had not actually returned the writ it was too late for appellee to take credit therefor and that the title of the goods had vested in the appellant. We agree with the contention of counsel for appellant that it was the duty of the

appellee to return the goods within a reasonable time after the expiration of the contract under all of the circumstances and conditions surrounding the parties and we think this doctrine is correctly announced in the case of House vs. Beak et al, 141 Ill.,290.

The delivery of the goods under this order constitutes, under the decisions of the courts, a "sale or return", which means "a sale with a right on the part of the buyer to return the goods at his option within a reasonable time." Benjamin on Sales, Vol. 2, Sec.913. House vs. Beak,et al,supra.

The only question to be disposed of is, had an unreasonable time elapsed for returning the goods under all the conditions before the suit was brought. It appears from the contract that if the notice to terminate the contract was given by the appellee that then the agreement was to continue for four months thereafter in order to give the appellant an opportunity to transfer the account. It seems to have been in the minds of the contracting parties that if the appellee terminated the contract that the appellant would want to place or transfer the account to some other persons or firms and that they were seeking time in which to make the transfer. At the expiration of the four months the appellee packed the patterns in bundles of fifty each and notified the appellant that the patterns were ready for shipment and asked them where they should ship them. To this appellant made no reply but suffered the goods to remain there without giving any direction as to their shipment. While it may be true as contended for by appellant that it was the duty of the appellee to return the goods, yet under the circumstances it seemed to be in the minds of the parties that the goods were to be transferred to some other person, and under the further condition that the appellant persis-

appellee to return the goods within a reasonable time after the expiration of the contract under all of the circumstances and conditions surrounding the parties and we think this doctrine is correctly announced in the case of Lance vs. Rosk et al, 141 Ill., 290.

The delivery of the goods under this order constitutes, under the decisions of the courts, a "sale or return", which means "a sale with a right on the part of the buyer to return the goods at his option within a reasonable time." Benjamin on Sales, Vol. 2, Sec. 1120. Rosk vs. Rosk, et al, supra.

The only question to be disposed of is, had an unreasonable time elapsed for returning the goods under all the conditions before the suit was brought. It appears from the contract that it is notice to terminate the contract was given by the appellee but that the agreement was to continue for four months unless terminated on three days give the appellant an opportunity to remove the machines. It seems to have been in the minds of the contracting parties that if the appellee terminated the contract in that time appellant would want to place or transfer the machines to other persons or firms and that they were contemplating the transfer. At the expiration of the four months the appellee packed the pictures in boxes and notified the appellant that the pictures were ready for shipment and asked that they be taken away. In this appellant made no reply but [illegible] there without giving any directions [illegible] shipment. While it may be true as contended [illegible] it was the duty of the appellee to [illegible] under the circumstances it seems to be in the [illegible] of the parties that the goods were to be transported to a [illegible] person, and under the further condition that the appellant [illegible]

tently refused to advise where the patterns should be sent to, we are unable to say that the court erred in finding that under the conditions the patterns were with-held for an unreasonable length of time. The appellant knew that the goods were ready for shipment, knew that the appellee was ready and willing at any time to ship them and with that knowledge did not even make a demand upon the appellee for payment for the goods. If the demand had been made upon appellee for a payment and they had refused to pay or deliver the goods then a different question might arise. In the case of House vs. Beak, Supra, the court said, "The buyer may make himself liable to pay the price fixed in the agreement by refusing to return the property upon demand made for it by the seller; but, if the seller does not want the property and makes no demand for it, it is none the less true that the buyer will become liable to pay the price fixed, upon failing to return the property within a reasonable time. In the present case, demands made for the price of the consigned goods, unanswered by either the payment of the money or an offer to return the goods, amounted substantially to such a refusal to surrender on demand, as was held to be sufficient in the Jones case".

The only witness introduced was Blumberg, who was fully examined by both appellant and appellee, and it would appear from his testimony that the appellee acted in good faith in with-holding the goods, believing that they were to be transferred to some other account or person engaged in like business, and we think were held for that purpose and that the court was warranted in finding that they had not been held for an unreasonable length of time under the conditions that existed, at least we are unable to say that the court erred in so finding, and the judgment of the lower court is affirmed. JUDGMENT AFFIRMED.

Not to be reported in full.

tantly refused to advise where the patterns should be sent to, we are unable to say that the court erred in finding that under the conditions the patterns were withheld for an unreasonable length of time. The appellant then that the goods were ready for shipment, that the appellee was ready and willing at any time to ship them and that appellee did not even make a demand upon the appellee for payment for the goods. If the issue had been made upon a claim for a payment and had related to any or several [illegible] then a different question might arise. In the case [illegible], however, the court erred. The buyer was under no liability to pay the price either in the alternative by refusing to return the property upon demand or for it by the seller; but, if the seller does not make any demand, or, when no demand for it, [illegible] the buyer will become liable to pay the price [illegible], instead of returning the property without a return in kind, or [illegible] case, one who made for the price [illegible], unanswered by either the payment of the money or offer to return the goods, [illegible] on account, [illegible] the other case.

The only [illegible] in a [illegible] would support the contention [illegible] right in withholding the goods [illegible] be tendered to [illegible] like business, and [illegible] that the court [illegible] hold for an unreasonable [illegible] that evidenced, we [illegible] the court erred in so finding, and the judgment of the lower court is affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 6th *day of* August *A. D. 191*0

C. C. Johnson

Clerk of the Appellate Court.

NOIN

15 - 23487

J. L. OBERMEYER,
Plaintiff in Error,

vs.

WISCONSIN DAIRY FARMS COMPANY,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 213

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This case is here for the second time. Defendant succeeded on the first trial on the theory that a false statement rendered, in which a check for $369.19 was sent plaintiff as the balance due him, worked an accord and satisfaction. This holding was held to be error and the judgment was reversed and the cause remanded to the Municipal court for a new trial upon the merits. See Obermeyer v. Wisconsin Dairy Farms Co., 19 Ill. App. 568. This adjudication settled the question of accord and satisfaction and we shall confine our review to the merits of the case.

Defendant initiated this transaction by a postal card in which he offered 27½ cents a pound for butter delivered in Chicago, less commission. This was followed by other solicitations at a similar price, relying upon which plaintiff made three shipments of butter to defendant as follows: August 18, 1913, 26 tubs of butter; August 25, 1913, 22 tubs of butter; September 1, 1913, 24 tubs of butter. Defendant advanced upon the first shipment $260 and a long time thereafter rendered a false statement of account and sent it to plaintiff with a check for $369.19, which it claimed was the balance due him.

It is admitted that defendant realized $1237.41 from the sale of plaintiff's butter, and it is insisted by

No. 25487

J. J. CHRISTEVEN, Plaintiff in Error,	
vs.	Error to Municipal Court of Chicago.
WISCONSIN DAIRY FARMS COMPANY, a corporation, Defendant in Error.	

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

This case is here for the second time. Defendant succeeded on the first trial on the theory that a false statement rendered, in which a check for $369.19 was sent plaintiff as the balance due him, worked an accord and satisfaction. The holding was held to be error and the judgment was reversed on the cause remanded by the Municipal Court for a new trial upon the merits. See Christeven v. Wisconsin Dairy Farms Co., 19 Ill. App. 366. This motion setting the question of accord and satisfaction and we shall confine our review to the merits of the case.

Defendant instituted this transaction by a letter in which he offered 27¢ cents a pound for butter delivered in Chicago, less commission. This was followed by letter modifications at a similar price, varying upon which plaintiff made three shipments of butter as follows: [illegible] 1, 1913, 28 tubs of butter; August 5, 1913, [illegible]; September 1, 1913, 24 tubs of butter. Defendant accepted upon the first shipment but one a long time thereafter rendered a false statement of account and sent in the plaintiff with a check for $369.19, which it cashed in the belief that it was the balance due it.

It is admitted that defendant realized $[illegible] from the sale of plaintiff's butter, and it is insisted by

plaintiff that defendant is not entitled to any commission but is entitled to credit only for freight and cartage on the three shipments and the two cash payments made, which total $666.07, leaving due plaintiff $571.34, on which amount plaintiff claims interest from September 13, 1913.

The ways of defendant in this transaction are to say the lease devious. In its defense it insists that it neither bought the butter nor was it the agent of plaintiff for its sale on commission.

The cause was submitted to the court for trial without a jury and there was a finding for defendant and judgment of nil capiat, of which judgment plaintiff seeks this review.

Defendant by its president represented to plaintiff that it had not sold the butter when as a matter of fact it had done so.

In December, 1913, at the request of plaintiff, Hunter, Walton & Co. of Chicago demanded of defendant delivery of the butter to it for plaintiff's account, offering to pay all proper charges thereon. This defendant under various excuses failed to do. In June plaintiff through its attorney made written demand for an accounting, to which defendant responded by rendering a false account, in which was shown gross receipts of $710.16, which charges for $260 advanced and $80.97 other disbursements, and enclosing a check for $369.19. Notwithstanding this action defendant's president admitted on the trial that the butter was sold for $1237.41. Defendant's president in answer to interrogatories stated that the gross amount of the sales of the butter was $1237.41. Among items of charges made against it were the following:

plaintiff that defendant is not entitled to any commission but is entitled to credit only for freight and cartage on the three shipments and the two cash payments made, which total $866.07, leaving due plaintiff $571.34, on which amount plaintiff claims interest from September 15, 1913.

The says of defendant in this transaction are to say the least devious. In its defense it insists that it neither bought the butter nor was it the agent of plaintiff for its sale on commission.

The cause was submitted to the court for trial without a jury and there was a finding for defendant and judgment of nil capiat, of which judgment plaintiff seeks this review.

Defendant by its president represented to plaintiff that it had not sold the butter when as a matter of fact it had done so.

In December, 1913, at the request of plaintiff, Hunter, Walton & Co. of Chicago demanded of defendant delivery of the butter to it for plaintiff's account, offering to pay all proper charges thereon. This defendant under various excuses failed to do. In June plaintiff through its attorney made written demand for an accounting, to which defendant responded by rendering a false account, in which was shown gross receipts of $710.10, which charges for $250 advanced and $80.87 other disbursements, and enclosing a check for $360.10. Notwithstanding this action defendant's president admitted on the trial that the butter was sold for $1327.41. Defendant's president in answer to interrogatories stated that the gross amount of the sales of the butter was $1327.41. Among items of charges made against it were the following:

Freight and express charges from Jackson, Minnesota, to Chicago, Chicago to Buffalo, Scranton, Richmond, Memphis, Galveston, and from each of these points to buyers.....$97.68

Storage at Chicago and each of the points named..... 41.09

Interest on $260 advanced at 6 per cent..... 12.80

Compiling list of retailers in Buffalo territory, 1800 names at $3.50 per thousand..... 6.30

Same Scranton, 2300 names..... 8.05

" Memphis, 1500 names,..... 5.25

" Richmond, 1200 names,..... 4.20

" Galveston, 900 names..... 3.15

Circularizing Buffalo, 1800, 4 times at 50 cents per thousand.....36.00.
" Scranton, 2300, 4 times at 50 cents per thousand 46.00
" Memphis, 1500, 4 times at 50 cents per thousand.....30.00
" Richmond, 1500, 4 times at 50 cents per thousand.....24.00
" Galveston, 900, 4 times at 50 cents per thousand.....18.00

Materials, wraps, boxes, tubs, liners, ...31.80
Paper, printing and envelopes for 770 names 4 times..123.20
Postage on circularizing and sales.....482.64
Special Commission, 15 per cent.....185.62.

This made the total amount of charges against the butter sold at $1237.47, $1208.98. These charges were made in the face of the fact that the butter had been sold soon after it reached Chicago. Defendant afterwards represented to plaintiff that the butter had not been sold but was in cold storage, and stated in a letter of December 12, 1913, that the "warehouse receipts are in our safe and show where this butter is on hand in cold storage." This statement was false when made by defendant and was known by it to be false.

From what we can gather from the record it seems that the trial Judge based his finding upon his conclusion that defendant was not plaintiff's agent. If defendant was not such agent, we are at a loss to discern the relationship between them. However this may be, this is a case of the

Freight and express charges from Jackson, Minnesota, to Chicago, Chicago to Buffalo, Scranton, Richmond, Memphis, Galveston, and from each of these points to buyers.....$97.58

Storage at Chicago and each of the points named..... 41.00

Interest on $680 advanced at 6 per cent..... 12.50

Compiling list of retailers in Buffalo territory, 1800 names at $3.50 per thousand..... 6.30

Same Scranton, 2300 names..... 8.05

" Memphis, 1800 names..... 5.25

" Richmond, 1300 names..... 4.55

" Galveston, 900 names..... 3.15

Circularizing Buffalo, 1800, 4 times at 50 cents per thousand.....36.00

" Scranton, 2300, 4 times at 50 cents per thousand 46.00

" Memphis, 1800, 4 times at 50 cents per thousand.....36.00

" Richmond, 1300, 4 times at 50 cents per thousand.....26.00

" Galveston, 900, 4 times at 50 cents per thousand.....18.00

Materials, wraps, boxes, tubes, liners, ...21.60
Paper, printing and envelopes for 7?? mailing 4 times..142.30
Postage on circularizing and sales.....38.04
Special Commission, 15 per cent.....189.00

This made the total amount of charges against the butter sold at $1437.47. Some charges were made in the face of the fact that the butter had been sold soon after it reached Chicago. Telegrams afterwards represented to plaintiff that the butter had not been sold but was in cold storage, and stated in a letter of December 1s, 1?, that the "warehouse receipts are in our safe and show that butter is on hand in cold storage." This statement was false when made by defendant and was known by it to be false.

From what we can gather from the record it seems that the trial judge based his finding upon his conclusion that defendant was not plaintiff's agent. If defendant was not such agent, we are at a loss to understand the relationship between them. In every case we, this is a case of the

fourth class in the Municipal court, and it has been held by this court that a case of the fourth class is what the evidence makes it. Plaintiff was therefore entitled to recover whatever was due him. It is clear from the proofs that the charges made by defendant regarding these 72 tubs of butter were fictitious, for the butter had in fact been disposed of within a few days after its arrival in Chicago. It is also clear that defendant was the agent of plaintiff in this transaction. The law required him as such agent to promptly and honestly account to plaintiff for the proceeds of the butter when sold. This defendant failed to do, but concealed the fact of its sale by various false statements regarding the same. The law requires an honest and fair dealing on the part of the agent with his principal. By making false statements and rendering false accounts, defendant forfeited its claim for commission. Sidway v. American Mortgage Co., 222 Ill. 270; Fish v. Seeberger, 154 ibid, 30; Brennan v. Strauss, 75 ibid, 234; Neal v. Bloomfield, 166 Ill. App. 402.

We find from the evidence that defendant sold plaintiff's butter for $1237.41; that the freight and cartage thereon, which defendant paid, was $36.88; that defendant advanced to plaintiff $260, and subsequently with its false statement sent its check to him for $369.19; that defendant is entitled to be allowed credits for the foregoing items, which total $666.07, leaving due from defendant to plaintiff $571.34, on which plaintiff is entitled to interest at the rate of 5 per cent from September 13, 1913. We therefore reverse the judgment of the Municipal court and enter judgment here in favor of plaintiff for $704.67.

REVERSED AND JUDGMENT HERE.

fourth class in the municipal court, and it has been held by this court that a case of the fourth class is what the evidence makes it. Plaintiff was therefore entitled to recover whatever was due him. It is clear from the proofs that the charges made by defendant regarding these 72 tubs of butter were fictitious, for the butter had in fact been disposed of within a few days after its arrival in Chicago. It is also clear that defendant was the agent of plaintiff in this transaction. The law required him as such agent to promptly and honestly account to plaintiff for the proceeds of the butter when sold. This defendant failed to do, but concealed the fact of its sale by various false statements regarding the same. The law requires an honest and fair dealing on the part of the agent with his principal. By making false statements and rendering false accounts, defendant forfeited his claim for commission. Midway v. American Mortgage Co., 222 Ill. 470; Tish v. Goodyear, 104 ibid. 59; Brennan v. Strauss, 75 ibid. 434; Ford v. Bloomfield, 188 Ill. App. 4[illegible].

We find from the evidence that defendant sold plaintiff's butter for $1227.41; that the freight and cartage thereon, which defendant paid, was $36.88; that defendant advanced to plaintiff $180, and subsequently wit. the false statement sent him a check to him for $959.19; that defendant is entitled to be allowed credits for the foregoing items, which total $664.07, leaving due from defendant to plaintiff $571.34, on which plaintiff is entitled to interest at the rate of 5 per cent from September 15, 1915. We therefore reverse the judgment of the municipal court and enter judgment here in favor of plaintiff for $704.67.

REVERSED AND JUDGMENT HERE.

244 - 23589

PETER BILLOW,
Appellee,

vs.

ISAAC MILLER,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

211 I.A. 214

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

The cause of action is sufficiently stated in an opinion on a former appeal to this court and as abstracted can be found in 194 Ill. App. 524. The former judgment against two defendants was reversed, as it came to this court on an appeal by both defendants, perfected and prosecuted by one of them only. On this appeal we held that a joint judgment against two defendants, where one only was proved to be liable, was erroneous.

The judgment in this record, rendered on the verdict of a jury, is for $336.80, and defendant appeals.

The suit after reversal by this court was dismissed as to the defendant Jacob Zeman.

A review of the evidence is not necessary. It is sufficient to say that the proof of plaintiff failed to establish any contract between himself and defendant or any liability of defendant to plaintiff growing out of any dealings between them. The contract involved was in writing between plaintiff and Jacob Zeman. If any liability remains unsettled under that contract, it is the liability of Zeman and not of defendant. As to Zeman's liability, if any, we express no opinion, as he is not a party to the judgment now being reviewed. The debt sued for arises under

244 - 23589

PETER BILLOW,
Appellee,

vs.

ISAAC MILLER,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

The cause of action is sufficiently stated in an opinion on a former appeal to this court and as abstracted can be found in 194 Ill. App. 324. The former judgment against two defendants was reversed, as it came to this court on an appeal by both defendants, perfected and prosecuted by one of them only. In this appeal we hold that a joint judgment against the defendants, where one only was proved to be liable, was erroneous.

The judgment in this record, rendered on the verdict of a jury, is for $336.80, and defendant appeals.

The suit after reversal by this court was dismissed as to the defendant Jacob Zeeman.

A review of the evidence is not necessary. It is sufficient to say that the proof of plaintiff failed to establish any contract between himself and defendant or any liability of defendant to plaintiff growing out of any dealings between them. The contract involved was in writing between plaintiff and Jacob Zeeman. If any liability remains unsettled under that contract, it is the liability of Zeeman and not of defendant. As to Zeeman's liability, if any, we express no opinion, as he is not a party to the judgment now being reviewed. The debt sued for arises under

a written contract with Zeman. It is contended that defendant promised to pay Zeman's indebtedness to plaintiff under that contract. As such an undertaking, if made, was a collateral and not an original one, its not being in writing makes it obnoxious to the Statute of Frauds as an undertaking to pay the debt of another. All this appeared from plaintiff's proofs. At the conclusion of these proofs defendant, in due form, moved for an instructed verdict in his favor, which the court denied. Such denial was reversible error.

For the reasons indicated the judgment of the County Court is reversed with a judgment of nil capiat and for costs against plaintiff both here and below.

REVERSED AND JUDGMENT OF NIL CAPIAT AND FOR COSTS.

a written contract with Zemen. It is contended that defendant promised to pay Zemen's indebtedness to plaintiff under that contract. As such an undertaking, if made, was a collateral and not an original one, its not being in writing makes it obnoxious to the statute of frauds as an undertaking to pay the debt of another. All this appeared from plaintiff's proofs. At the conclusion of these proofs defendant, in due form, moved for an instructed verdict in his favor, which the court denied. Such denial was reversible error.

For the reasons indicated the judgment of the County Court is reversed with a judgment of nil dicit and for costs against plaintiff both here and below.

REVERSED AND JUDGMENT NIL DICIT
GRANTED AND FOR COSTS.

409 - 23754

ANNIE LEE MEDCALF,
Appellee,

vs.

CHICAGO & WESTERN INDIANA
RAILROAD COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

211 I.A. 215

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for $15,000 entered upon the verdict of a jury in an action for personal injuries.

The accident to plaintiff happened while she was walking upon the right of way of defendant upon its north bound track. Her objective was the tower house in which John H. Shackleford was employed, to whom she was carrying a luncheon for midnight consumption. The time of the accident was about eight o'clock in the evening of July 10, 1913. She was struck by an engine of the Chesapeake & Ohio Railway Company drawing a train of freight cars resulting in the severing of her left arm near the shoulder and the infliction of other injuries. There were joined with defendant in this action the Chesapeake & Ohio Railway Company and the Belt Railway Company of Chicago, who were dismissed out of the action upon the trial.

The original count in the declaration charges that while plaintiff was walking upon the right of way of defendant at its invitation, in the exercise of due care, for the purpose of delivering to an employee of defendant his supper, defendant wilfully, maliciously and recklessly ran her down. Subsequently she filed four additional counts, in the first of which she alleged that defendants maintained a tower house north of the Calumet river alongside the rail-

ANNIE ILSE LINDGAIS, Appellee,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
CHICAGO & WESTERN INDIANA RAILROAD COMPANY, Appellant.	

MR. PRESIDING JUSTICE SCANLAN

DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for $15,000 entered upon the verdict of a jury in an action for personal injuries.

The accident to plaintiff happened while she was walking upon the right of way of defendant upon its north bound track. Her objective was the tower house in which John H. Shackleford was employed. It was her custom to bring him a luncheon for midnight consumption. The time of the accident was about eight o'clock in the evening of July 7, 1919. She was struck by an engine of the Chicago & Ohio Railway Company drawing a train of freight cars resulting in the severing of her left arm near the shoulder and the infliction of other injuries. There were joined with defendant in this action the Chesapeake & Ohio Railway Company and the Lake Railway Company of Chicago, who were dismissed out of the action upon the trial.

The original count in the declaration charges that while plaintiff was walking upon the right of way of defendant at the invitation, in the exercise of due care, for the purpose of delivering to an employee of defendant his supper, defendant wilfully, maliciously and wantonly ran her down. Subsequently she filed four additional counts, in the first of which she alleged that defendant maintained a tower house north of the Calumet river alongside the rail-

road tracks, which tower house on the day of the accident was in charge of one John H. Shackleford, an employee of defendants, who worked from six o'clock p. m. to six o'clock a. m.; that it was customary for him to have his supper delivered at the tower house at night, all of which was known to and permitted by defendants. She then avers that it was the duty of defendants to provide at that place a safe and suitable manner and method of getting to and from said tower house for employees and persons having business therein, the nonperformance of which duty constituted defendants' negligence.

Further, that on July 10, 1913, while she was walking upon said tracks, for the purpose of delivering his supper to Shackleford, and while proceeding with all due care and caution for her safety, the Chesapeake & Ohio Railway Company by its agents and servants carelessly, negligently, wilfully, wantonly and recklessly ran and drove a certain locomotive engine and train of freight cars thereto attached into, upon, against and over plaintiff, etc.

The second count is similar to the first, and in it it was alleged that it was customary for Shackleford to have his supper delivered to him at night, all of which was known to and permitted by defendants, and that plaintiff was walking upon the tracks by invitation. This count also alleges failure to have a headlight upon the locomotive or to sound a gong, bell or whistle to warn plaintiff.

The third count alleges it was defendants' duty to use ordinary and reasonable care to avoid injury to persons rightfully upon its tracks and right of way; that at the time of the accident she was walking upon the right of way in the exercise of due care and precaution for her safety

road tracks, which tower house on the day of the accident was in charge of one John H. Shackleford, an employee of defendants, who worked from six o'clock p. m. to six o'clock a. m.; that it was customary for him to have his supper delivered at the tower house at night, all of which was known to and permitted by defendants. She then avers that it was the duty of defendants to provide at that place a safe and suitable manner and method of getting to and from said tower house for employees and persons having business therein, the nonperformance of which duty constituted defendants' negligence.

Further, that on July 10, 1913, while she was walking upon said tracks, for the purpose of delivering his supper to Shackleford, and while proceeding with all due care and caution for her safety, the Chesapeake & Ohio Railway Company by its agents and servants carelessly, negligently, wilfully, wantonly and recklessly ran and drove a certain locomotive engine and train of freight cars thereto attached into, upon, against and over plaintiff, etc.

The second count is similar to the first, and in it it was alleged that it was customary for Shackleford to have his supper delivered to him at night, all of which was known to and permitted by defendants, and that plaintiff was walking upon the tracks by invitation. This count also alleges failure to have a headlight upon the locomotive or to sound a gong, bell or whistle to warn plaintiff.

The third count alleges it was defendants' duty to use ordinary and reasonable care to avoid injury to persons rightfully upon the tracks and right of way; that at the time of the accident she was walking upon the right of way in the exercise of due care and caution for her safety

for the purpose of delivering to an employee of defendants his supper; and that the defendants, by their servants, wilfully, recklessly and negligently ran, drove, managed and operated a certain locomotive engine so that the same ran over her, etc.

The fourth count was similar to the second in its averments, and in it it was alleged that the Chesapeake & Ohio Railway Company, by its agents, ran a locomotive engine and train of freight cars in a northerly direction in a careless, negligent, wanton, willful and reckless manner upon and against plaintiff, injuring her, etc.

To these several counts defendants interposed pleas of the general issue and a special plea of non-ownership and non-control.

The declaration proceeds upon the theory that plaintiff was a licensee and went upon the railroad tracks upon an implied invitation, and the charge in each count is that defendants wantonly, willfully, recklessly, etc., ran over and injured her. As a licensee the duty which defendant owed plaintiff was simply not to wantonly or willfully injure her and to use reasonable care to avoid injuring her after discovering her to be in peril. This was the limit of defendant's duty. Thompson v. C. C. C. & St. L. Ry. Co., 226 Ill. 542. In I. C. R. R. Co. v. Eicher, 202 ibid, 556, the rule regarding such duty is laid down in the following language:

> "A railroad company owes no duty to a person walking along its tracks without its invitation, either expressed or implied, except to refrain from wantonly or wilfully injuring him, and to use reasonable care to avoid injury to him after he is discovered to be in peril; and it makes no difference in that respect whether he is a trespasser, a mere licensee, or one who is on the tracks by mere sufferance, without objection of the company. One who goes upon a railroad track by permission, or where permission may be implied from the circumstances, may be regarded as having a license, but one who is there by mere

for the purpose of delivering to an employee of defendants his supper; and that the defendants, by their servants, wilfully, recklessly and negligently ran, drove, managed and operated a certain locomotive engine so that the same ran over her, etc.

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To these several counts defendants interposed pleas of the general issue and a special plea of non-ownership and non-control.

The declaration proceeds upon the theory that plaintiff was a licensee and went upon the railroad tracks upon an implied invitation, and the charge in each count is that defendants wantonly, wilfully, recklessly, etc., ran over and injured her. As a licensee the duty which defendant owed plaintiff was simply not to wantonly or wilfully injure her and to use reasonable care to avoid injuring her after discovering her to be in peril. This was the limit of defendant's duty. Thompson v. C. C. C. & St. L. Ry. Co., 226 Ill. 342. In I. C. R. R. Co. v. Hooper, 203 Ind. 588, the rule regarding such duty is laid down in the following language:

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sufferance, is not a licensee and may be a trespasser. In either case there is no duty toward him except to refrain from wantonly or wilfully injuring him. (Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500; Lake Shore & Michigan Southern Ry. Co. v. Bodemen, 139 id. 596; Illinois Central Railroad Co. v. Noble, 142 id. 578; Wabash Railroad Co. v. Jones, 163 id. 167; Illinois Central Railroad Co. v. O'Conner, 189 id. 559.) In Illinois Central Railroad Co. v. Godfrey, supra, no distinction was made between a licensee and a trespasser, but the same rule was applied to both, and it was said, 'A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.' One who has permission or license to travel along the tracks takes it subject to the use of the road without reference to him. The license imposes no obligation to take precautions for his safety or to run trains in any respect different from what they would be run if he was not there. He takes the premises as he finds them, with all the attendant dangers connected with their use, only subject to the limitation that the company shall not inflict upon him wanton or intentional injury."

The result of our decision rests within the rules of law announced in the foregoing quotations and the cases there cited.

The facts relating to the accident which are not controverted are that plaintiff, a resident of Marlowe, Oklahoma, came to Chicago in June, 1913, and visited at the home of John H. Shackleford, of whose wife she was a cousin. Shackleford lived at the time of the accident in a house belonging to defendant, in whose employ he was as a "tower man." This house was near the tracks of defendant in the vicinity of the Calumet drawbridge. Shackleford's duties were performed between the hours of six o'clock p. m. and six a. m. of a continuous working day. The tower house in and from which Shackleford discharged his duties was situate just north of the Calumet river near defendant's tracks and right of way. Plaintiff and her cousin were in the habit of taking to Shackleford at this tower house a luncheon which he ate at midnight. They at times went together and at other times only one of them went. On the east of the right of way there was a road called Torrence avenue and also a well beaten

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The result of our decision rests within the rules of law announced in the foregoing quotations and the cases there cited.

The facts relating to the accident which are not controverted are that plaintiff, a resident of Carlyle, Illinois, came to Chicago in June, 1913, and visited at the home of John H. Shackleford, of whose wife she was a cousin. Shackleford lived at the time of the accident in a house belonging to defendant, in whose employ he was as a "tower man." This house was near the tracks of defendant in the vicinity of the Calumet drawbridge. Shackleford's duties were performed between the hours of six o'clock p. m. and six a. m. of a continuous working day. The tower house in and from which Shackleford discharged his duties was situate just north of the Calumet river near defendant's tracks and right of way. Plaintiff and her cousin were in the habit of taking to Shackleford at this tower house a luncheon which he ate at midnight. They at times went together and at other times only one of them went. On the east of the right of way there was a road called Torrence Avenue and also a well beaten

path on the old right of way to the west of the existing right of way as it existed at the time of the accident. These were accessible to all persons in reaching the tower house from the Shackleford house and its vicinity. There were no eye witnesses to the accident. Plaintiff's narration of the occurrence is in the record uncontradicted and is in substance that about eight o'clock July 10, 1913, she left the Shackleford home to carry a luncheon to Shackleford at the tower house of defendant; that she proceeded from the Shackleford house to a small brick house to the north of it, then went up some steps which led to the embankment of the railroad track and thence down the track on a little footpath; that she was going north walking on the left side of the southbound track; that the path was on the embankment just where the signals were, and on the edge of the ballast; that the path was about a foot wide and continued alongside the rails over to the signals, where it stopped; that she got to the end of the path and saw a train coming on the southbound track near where she was walking; that she crossed both tracks - the north and south tracks - to keep away from the passing train; that she was then east of both tracks; that she walked very slowly and looked back, because she was going to cross back on the other side; that she walked on the east side the distance that a person would walk with rather a long train passing, walking very slowly; that the train took two or three minutes to pass; that there were about forty cars in that train; that just as it had about passed, all but the caboose and a car, she started back over to the other side; that she again looked back south before walking across, but saw nothing but the passing train, nor heard no signal; that she then started across the track; that she crossed the east rail of the east track and was in between

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the two rails of the east track and had nearly crossed the track when she was struck by the northbound train; that this was between 25 and 35 feet north of the signals; that she was struck a little to the left side as she was going across when the train struck her, severing her left arm at the shoulder.

The train which struck plaintiff was proceeding slowly - not more than six miles an hour. The train which she stepped aside to avoid was going south; the train which struck her was going north. The southbound train was going quite fast and made much noise, although that it made much smoke is in dispute. Be this as it may, there is no evidence in this record warranting the conclusion that defendant's servants in the running of the train which struck plaintiff acted either willfully or wantonly. The tracks upon which plaintiff was injured were constantly traveled by trains proceeding north and south, there being much traffic passing into and out of Chicago. Several railroads operated their trains over these tracks of defendant. Knowledge of these conditions and of the risk to pedestrians using defendant's right of way was at least imputable to plaintiff, and from her knowledge gained in walking along the right of way to and from the tower house it is but reasonable to say that she had actual notice of such conditions. Whether plaintiff was negligent in not seeing the approaching train, by reason or not of the smoke created by the southbound train, or in suddenly getting in its path, is of no importance, because to whichever of these causes the accident is attributable, no right of recovery can be predicated upon either. While it is clear there were two safe ways in which plaintiff could have reached the tower house on the day of the accident, and which prudence should have led plaintiff to have taken instead of the perilous path which she trod, still

the two rails of the east track and had nearly crossed the track when she was struck by the northbound train; that this was between 25 and 30 feet north of the signals; that she was struck a little to the left side as she was going across when the train struck her, severing her left arm at the shoulder.

The train which struck plaintiff was proceeding slowly - not more than six miles an hour. The train which she stepped aside to avoid was going south; the train which struck her was going north. The southbound train was going quite fast and made much noise, although that it made much smoke is in dispute. As this as it may, there is no evidence in this record warranting the conclusion that defendant's servants in the running of the train which struck plaintiff acted either wilfully or wantonly. The tracks upon which plaintiff was injured were constantly traveled by trains proceeding north and south, there being much traffic passing into and out of Chicago. Several railroads operated their trains over these tracks of defendant. Knowledge of these conditions and of the risk to pedestrians using defendant's right of way was at least imputable to plaintiff, and from her knowledge gained in walking along the right of way to and from the tower house it is but reasonable to say that she had actual notice of such conditions. Whether plaintiff was negligent in not seeing the approaching train, by reason or not of the smoke created by the southbound train, or in suddenly getting in its path, is of no importance, because to whichever of these causes the accident is attributable, no right of recovery can be predicated upon either. While it is clear there were two safe ways in which plaintiff could have reached the tower house on the day of the accident, and which prudence should have led plaintiff to have taken instead of the perilous path which she trod, still

aside from her negligence in this regard, she being at the most a licensee upon the right of way of defendant, she has no right of action against defendant, under well settled legal principles. Plaintiff in walking along the right of way of defendant assumed all attendant risks with the single exception of wanton or wilful injury at the hands of defendant or its servants, or the lack of reasonable effort to avoid injuring her after it became evident she was in a perilous situation.

Nor did plaintiff's presence as a licensee impose upon defendant the duty of taking any precaution for her safety or of running its trains in any respect differently than they would have been run had she not been there. Even the absence of a headlight, if one were essential, or the failure to give a signal or ring the bell of the engine, would not render defendant liable to a person who was on the tracks by implied invitation as a licensee. Thompson v. C. C. C. & St. L. Ry. Co., supra.

The record lacking proof that plaintiff's injuries were occasioned by the wanton or willful act of defendant or its servants, or that defendant was negligent in not using reasonable diligence to avoid injuring plaintiff after discovering the perilous situation in which she had placed herself, plaintiff is not entitled to recover in this action, and the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

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Nor did plaintiff's presence as a licensee impose upon defendant the duty of taking any precaution for her safety or of running its trains in any respect differently than they would have been run had she not been there. Even the absence of a headlight, if one were essential, or the failure to give a signal or ring the bell of the engine, would not render defendant liable to a person who was on the tracks by implied invitation as a licensee. Thompson v. C. C. C. & St. L. Ry. Co., supra.

The record lacking proof that plaintiff's injuries were occasioned by the wanton or willful act of defendant or its servants, or that defendant was negligent in not using reasonable diligence to avoid injuring plaintiff after discovering the perilous situation in which she had placed herself, plaintiff is not entitled to recover in this action, and the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

409 - 23764 FINDING OF FACT.

The court finds that the defendant was not guilty of any act of negligence charged in the declaration of plaintiff or in any count thereof.

FINDING OF FACT.

The court finds that the defendant was not guilty of any act of negligence charged in the declaration of plaintiff or in any count thereof.

559 - 23904

FRED ALLEN AUTOMOBILE SUPPLY CO., a corporation,
Appellee,

vs.

H. W. JOHNS-MANVILLE CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 217

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1075.24 in favor of plaintiff entered upon the finding of the court.

The action is upon a written contract between the parties in which plaintiff agreed to purchase from defendant within twelve months from its date all plaintiff's requirements of "Red Seal Batteries" at prices and upon terms in the contract specified. The contract contains ~~a~~ this ~~significant~~ provision - that plaintiff will "devote their best efforts in promoting the sale of the same," meaning the Red Seal batteries in the contract described. The contract provided for certain discounts from scheduled prices above certain quantities delivered and paid for within the contract time for deliveries and payment.

While many points are made for reversal and ingeniously argued with ample citation of supporting authority, we are of the opinion that the whole case rests in our construction of the contract as to what was meant by the provision that defendant would furnish sufficient of the contract commodity to meet the requirements of plaintiff during the year the contract was in force. Plaintiff contends and proved that its requirement for the twelve months period of the contract was 143 barrels more than de-

589 - 25904

YORK ALLIED AUTOMOBILE SUPPLY CO., a corporation, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
H. W. JOHNS-MANVILLE CO., a corporation, Appellant.	

2 I L L . 2 I 7

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While many points are made for reversal and ingeniously argued with ample citation of supporting authority, we are of the opinion that the whole case rests in our construction of the contract as to what was meant by the provision that defendant would furnish sufficient of the contract commodity to meet the requirements of plaintiff during the year the contract was in force. Plaintiff contends and proved that its requirement for the twelve month period of the contract was 142 barrels more than de-

fendant delivered and that demand therefor was made; that plaintiff needed for its requirements these 143 barrels, which, in the course of its business and under its contract, it had sold to its customers, and that the difference between the contract price and the price at which it had sold said 143 barrels of batteries, adding thereto the discounts which it would have been entitled to under the contract, was $1054.83, with interest at five per cent, which was the basis of the trial court's finding and judgment.

Defendant did furnish plaintiff under the contract 32 barrels of batteries and insisted that these were sufficient to meet all reasonable requirements of plaintiff. Defendant admitted that it refused to sell or deliver more than said 32 barrels to plaintiff.

There is no force in the contention that the contract is nudum pactum and void for want of mutuality. Nor is the contract unilateral; it is bilateral and there exists within it the reciprocal obligation on the part of plaintiff to buy and pay for the batteries and upon the part of defendant to furnish the batteries at the contract price within the time limited by the contract. Where a contract is not ambiguous, the intention of the parties cannot be determined by evidence aliunde, but by the language employed in the contract itself. Joliet v. Brewing Co., 254 Ill. 215.

We agree with the argument of defendant that the legal inquiry is, "What was the intention of the parties?" We think it clearly apparent from the contract that defendant was to furnish plaintiff with batteries as described in it to meet all plaintiff's requirements for twelve months, as those requirements might materialize during that time with plaintiff devoting its best efforts to promote the sale of the batteries. We find nothing ambiguous in the language used in the contract in this re-

fendant delivered and that demand therefor was made; that plaintiff needed for its requirements these 142 barrels, which, in the course of its business and under its contract, it had sold to its customers, and that the difference between the contract price and the price at which it had sold said 142 barrels of batteries, adding thereto the amounts which it would have been entitled to under the contract, was $1084.85, with interest at five per cent, which was the basis of the trial court's finding and judgment.

Defendant did furnish plaintiff under the contract 32 barrels of batteries and insisted that these were sufficient to meet all reasonable requirements of plaintiff. Defendant admitted that it refused to sell or deliver more than said 32 barrels to plaintiff.

There is no force in the contention that the contract is *nudum pactum* and void for want of mutuality. Nor is the contract unilateral; it is bilateral and is enforceable within the contractual obligation on the part of plaintiff to buy and pay for the batteries and on the part of defendant to furnish the batteries at the contract price within the time limited by the contract. Where a contract is not ambiguous, the intention of the parties cannot be not proved by evidence *aliunde*, but by the language employed in the contract itself. *Joliet* v. *Drewing Co.*, 206 Ill. 413.

We agree with the argument of defendant that the legal inquiry is, "What was the intention of the parties? We think it clearly appears from the contract that defendant was to furnish plaintiff with batteries as described in it to meet all plaintiff's requirements for twelve months, as those requirements might materialize during that time with plaintiff devoting its best efforts to promote the sale of the batteries. We find nothing ambiguous in the language used in the contract in this re-

gard; nothing calling for oral proof to define and make clear. Parsons on Contracts, page 527, well states the principle thus:

> "The decision must always depend upon the intention of the parties, to be collected in each particular case from the agreement itself and from the subject-matter to which it relates. It cannot depend on any formal arrangement of the words, but the reason and the sense of the thing, as it is to be collected from the whole contract."

Applying this dicta to the contract in hand, we would say in construing it that defendant was a manufacturer of the kind of batteries set out in the contract; that it desired to sell as many of them as possible in one year at certain prices and under certain conditions, and for that purpose made the contract with plaintiff in which to carry out such purpose, and thereby bound plaintiff to use its best efforts to promote the sale of the batteries. There was no limit to the quantity plaintiff might sell. It was to establish its requirements by procuring as many orders for the batteries as it could by the use of its best efforts; no reference to past sales in the previous year was made; no looking backward, but a going forward for one year to sell all the batteries which it could in the exercise of its best efforts. This plaintiff did, and in effect defendant now complains that plaintiff was too active and used too much effort in making sales. However, in the honest discharge of its duty under the contract, plaintiff ought not to have done less. The contract, as the proof shows, being advantageous to plaintiff, undoubtedly stimulated its energy in making sales. This was a condition it had a right to advantage of. The complaint of defendant is the usual one with sellers on a rising market. At this time the contract became a financial disappointment to defendant. It could sell its wares elsewhere for money in excess of the contract price. Hence defendant's

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> "The decision must always depend upon the intention of the parties, to be collected in each particular case from the agreement itself and from the subject-matter to which it relates. It cannot depend on any formal arrangement of the words, but the reason and the sense of the thing, as it is to be collected from the whole contract."

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default in performance, with the evident intent of taking a chance of escaping liability through legal technicality. The inconsistency of defendant's attitude is disclosed by its offer to prove that in the previous year plaintiff's requirements did not exceed 10 barrels, when it actually delivered 32 barrels under the contract without any hesitation or complaint - a quantity, according to such contention, three times and more in excess of plaintiff's reasonable requirements. After that the only change which occurred was an increase in the value of the batteries under contract. The minds of the parties must be determined from the language of the contract, and the requirememts of plaintiff must be construed to mean the reasonable requirements which would result from the activities of plaintiff in making sales which both the letter and the ppirit of the contract required. The proof related to orders actually obtained, as we gather from the evidence. The reasons these orders were not filled were twofold - first, defendant's failure to furnish the batteries on request; and, second, the inability of plaintiff to procure them in the market. A verbal order is when proven just as binding as one in writing. It was not necessary for plaintiff to prove the orders by the parties giving them. Defendant if he had doubted the veracity of this proof might have called the persons giving the orders in denial. Plaintiff's evidence as to this was not hearsay. The discounts allowed by the contract were properly proven as elements of damage.

Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, sustains plaintiff's contention that a contract to supply a commodity sufficient to meet the requirements of

default in performance, with the evident intent of taking a chance of escaping liability through legal technicality. The inconsistency of defendant's attitude is disclosed by its offer to prove that in the previous year plaintiff's requirements did not exceed 10 barrels, when it actually delivered 32 barrels under the contract without any hesitation or complaint - a quantity, according to such contention, three times and more in excess of plaintiff's reasonable requirements. After that the only change which occurred was an increase in the value of the batteries under contract. The minds of the parties must be determined from the language of the contract, and the requirements of plaintiff must be construed to mean the reasonable requirements which would result from the activities of plaintiff in making sales which both the letter and the spirit of the contract required. The proof relative to orders actually obtained, as we gather from the evidence. The reasons these orders were not filled were twofold - first, defendant's failure to furnish the batteries on request; and, second, the inability of plaintiff to procure them in the market. A verbal order is when proven just as binding as one in writing. It was not necessary for plaintiff to prove the orders by the parties giving them. Defendant if he had doubted the veracity of this proof might have called the persons giving the orders in denial. Plaintiff's evidence as to this was not hearsay. The discounts allowed by the contract were properly proven as elements of damage.

Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, sustains plaintiff's contention that a contract to supply a commodity sufficient to meet the requirements of

a party is not only not void for want of mutuality, but is enforceable at law. There could be no lack of mutuality under the instant contract, because these requirements were coupled with the condition the plaintiff should use its best efforts to make sales. National Furnace Co. v. Keystone Mfg. Co., 110 ibid 427. Such contracts, it is held in Minnesota Lumber Co. case supra, "are not uncommon and we have never understood that they were void."

Where a party partly performs a contract he can not afterwards at his own election avoid its further performance upon the alleged ground of want of mutuality. As said in Taylor v. Scott, 178 Ill. App. 487: "A party to a contract may not perform it, so far as it is beneficial to him, and hide behind its want of mutuality when called upon to perform the part of it that is beneficial to the other party." As applied to the case under review, we find defendant performing the contract without any claim of infirmity in it until the time when its further performance became unprofitable. Then it sought to avoid it. It is too late to avoid after part performance. Miller v. Moffit, 153 ibid 1.

There are no reversible errors in procedure or the rulings of the trial Judge regarding the defenses interposed or the evidence admitted or excluded, or in the admeasurement of damages. The judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

a party is not only not void for want of mutuality, but is enforceable at law. There could be no lack of mutuality under the instant contract, because these requirements were complied with, the condition the plaintiff should use its best efforts to make sales." National Furnace Co. v. Kayatone Mfg. Co., 110 Ind 427. Such contracts, it is said in Minnesota Lumber Co. case supra, "are not uncommon and we have never understood that they were void."

Where a party partly performs a contract he can not afterwards at his own election avoid its further performance upon the alleged ground of want of mutuality. As said in Taylor v. Scott, 176 Ill. App. 427: "A party to a contract may not perform it, so far as it is beneficial to him, and hold behind its want of mutuality when called upon to perform the part of it that is beneficial to the other party." As applied to the case under review, we find defendant performing the contract without any claim of infirmity in it until the time when its further performance became unprofitable. Then it sought to avoid it. It is too late to avoid after part performance. Miller v. Wolff, 183 Ind 1.

There are no reversible errors in procedure or the rulings of the trial Judge rejecting the defenses interposed or the evidence admitted or excluded, or in the admeasurement of damages. The judgment of the municipal court is therefore affirmed.

AFFIRMED.

232 - 23577

ANTON J. CERMAK for use of JAMES MOLONEY,
Appellant,

vs.

CABLE PIANO CO., a corporation, et al.,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 219

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against the defendant upon a replevin bond. The trial court entered judgment in favor of the defendant and plaintiff brings the case here by appeal.

The Progressive Club of Chicago on October 31, 1914, attempted to convey a piano to defendant by a chattel mortgage to secure the payment of a debt due the defendant resulting from a sale by defendant of the piano to the Progressive Club. On December 8, 1914, the Progressive Club by chattel mortgage conveyed this piano and other goods and chattels to James Moloney, for whose use the suit is brought by plaintiff, to secure the payment of $1,800 due him by the Progressive Club.

The Cable Piano Company mortgage was executed by the president of the club and acknowledged by him by his attorney in fact. The Moloney mortgage was executed by the president and secretary of the club and duly acknowledged by them. Both mortgages were recorded in the Recorder's office of Cook County, Illinois. On default in payment of the notes secured by the Moloney mortgage, Moloney took possession of the piano in question and other personal property under his mortgage. While so in possession the Cable Piano Company replevied the piano from him. The

ARTHUR J. GUNNER, for use of
JAMES MORAHAN,
Appellant,

vs.

CABLE PIANO CO., a corporation,
et al.,
Appellees.

Appeal from the Superior Court
of Cook County.

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior Court of Chicago against the defendant upon a replevin bond. The trial court entered judgment in favor of the defendants and plaintiff brings the case here by appeal.

The defendants, Cable Piano Co. of Illinois, in March 1914, attempted to convey a piano to plaintiff by a chattel mortgage to secure the payment of a note due the defendant resulting from a sale by defendants of the piano to the Progressive Club. In December, 1914, the Progressive Club by chattel mortgage, conveyed this piano and other goods and chattels to James Morahan, for which the [illegible] was given by plaintiff, to secure the payment of [illegible] made by the Progressive Club.

The Cable Piano Co. replevied the [illegible] by the president of the club and [illegible] attorney in fact. The replevy [illegible] by the president and secretary of the club and [illegible] by them. Both mortgages were recorded in the [illegible] office of Cook County, Illinois. [illegible] the notes secured by the Moran mortgage, demanded the possession of the piano in question [illegible] property under his mortgage. While so in possession the Cable Piano Company replevied the piano from him. The

Cable Piano Company did not prosecute this suit and it failed to return the piano on demand under a writ of retorno habendo. Suit was then begun on the replevin bond.

The principal point in controversy between the parties is as to whether the defendant could legally deprive Moloney of possession of the piano, notwithstanding the fact that it is conceded that the mortgage to the defendant was invalid as to persons not parties or privies to it.

In Kennedy Furniture Co. v. Griffin, 194 Ill. App. 530, it was held that a chattel mortgage acknowledged by the mortgagor by attorney in fact was invalid as against a purchaser of the property from the mortgagor, such purchaser not being a party or privy to the mortgage, and that a chattel mortgage must be strictly construed as against those seeking to enforce it, for the reason that it is a creature of the statute, and contrary to the common law. Kimball v. Polakow, 268 Ill. 344.

It is conceded by defendant that Moloney was in possession of the piano at the time of service of the replevin writ. It is insisted on behalf of the defendant that the plaintiff made no proofs of possession or any right to possession in opening his case. The record shows that the property was replevined from Moloney. In opening his case the plaintiff introduced in evidence the affidavit filed in the replevin suit, the writ of replevin issued thereon, the service of the writ and its return and the failure of the defendant to prosecute the suit, the judgment of the court in the replevin suit, and the issuance and service of the writ of retorno habendo.

The affidavit charged that the piano in question was in the possession of Moloney and another person and the return of the writ shows that it was found in the possession

Cable Piano Company had not proceeded this suit and it relied to return the piano on demand under a writ of replevin [illegible]. Suit was then begun on the replevin bond.

The principal point in controversy between the parties is as to whether the defendant could legally deprive [illegible] of possession of the piano, notwithstanding the fact that it is conceded that the mortgage to the defendant was invalid as to persons not parties or privies to it.

In Kennedy Furniture Co. v. Pritchin, 166 Ill. App. 580, it was held that a chattel mortgage unacknowledged by the mortgagor by attorney in fact was invalid as against a purchaser of the property from the mortgagor, such purchaser not being a party or privy to the mortgage, and that a chattel mortgage must be strictly construed as against those seeking to enforce it, for the reason that it is a creature of the statute, and contrary to the common law. Kaughl v. Pickering, 265 Ill. 344.

It is conceded by defendant that [illegible] in possession of the piano at the time of service of the replevin writ. It is insisted by [illegible] that the plaintiff made no proofs of possession or any right to possession in proving his case. The record shows that the property was replevined from [illegible]. In [illegible] case the plaintiff introduced [illegible] in the replevin suit, the writ of replevin [illegible], the service of the writ and its return and the failure of the defendant to prosecute the suit, the [illegible] court in the replevin suit, and the insufficiency of service of the writ of replevin [illegible].

The affidavit charges that the [illegible] tion was in the possession of [illegible], [illegible] the return of the writ shows that it was found in the possession

of Moloney. The evidence shows that the Moloney mortgage was issued in good faith; that Moloney advanced money to the Progressive Club to relieve its property from the lien of a judgment which had been entered against it. It was executed by the proper officers and the only claim made by defendant against its validity is that the plaintiff did not undertake to prove and did not prove that the execution of the mortgage was duly authorized by the members of the club; and it is contended that the burden of proof rested upon the plaintiff to show that his mortgage was a valid one.

Moloney's possession was taken under a mortgage which was valid upon its face; under such circumstances his right to possession of the property cannot be questioned by one claiming under a mortgage, invalid on its face, as against persons not privies thereto. Moloney being in possession of the property and the legal title thereto having vested in him, it is not important to inquire whether the chattel mortgage under which he got possession was executed with all the formalities required by law. Reebie v. Brackett, 109 Ill. App. 631. Nor do we think that it was incumbent upon him in the first instance to show that in the execution of the mortgage the corporation mortgagor had complied with all the requirements of the law, even if it be conceded that the members of the corporation had not directly authorized the execution of the instrument. Moloney's right to possession of the piano could not be disturbed except by some person claiming and proving a superior right as against him. The defendant had no right to the possession of the property at all.

There was sufficient proof as to the value of the piano taken under the writ. The plaintiff sought to prove the value of the piano by the evidence of certain witnesses,

of Maloney. The evidence shows that the Maloney mortgage was issued in good faith; that Maloney advanced money to the progressive Club to relieve its property from the lien of a judgment which had been entered against it. It was executed by the proper officers and the only claim made by defendant against its validity is that the plaintiff did not undertake to prove and did not prove that the execution of the mortgage was duly authorized by the members of the club; and it is contended that the burden of proof rested upon the plaintiff to show that his mortgage was a valid one.

Maloney's possession was taken under a mortgage which was valid upon its face; under such circumstances his right to possession of the property cannot be questioned by one claiming under a mortgage, invalid on its face, as against persons not privies thereto. Maloney being in possession of the property and the legal title thereto having vested in him, it is not important to inquire whether the chattel mortgage under which he got possession was executed with all the formalities required by law. Beckie v. Brockett, 109 Ill. App. 821. Nor do we think that it was incumbent upon him in the first instance to show that in the execution of the mortgage the corporation mortgagor had complied with all the requirements of the law, even if it be conceded that the members of the corporation had not directly authorized the execution of the instrument. Maloney's right to possession of the piano could not be disturbed except by some person claiming and proving a superior right as against him. The defendant had no right to the possession of the property at all.

There was sufficient proof as to the value of the piano taken under the writ. The plaintiff sought to prove the value of the piano by the evidence of certain witnesses.

the worth of whose testimony might well be regarded as doubtful. We think, however, that reversible error was not committed in admitting this evidence. The affidavit filed in the replevin suit by the defendant expressly fixed the value of the property at $500, and while this affidavit is contradicted by evidence of witnesses for the defendant, it is supported by the testimony of witnesses for the plaintiff. While, as urged, the statements contained in the affidavit are, under the authorities, to be regarded as at least prima facie proof of the value of the property in question, (Farson v. Gilbert, 85 Ill. App. 364) we think that taken together with the other evidence in the case, this admission is sufficient to warrant our entering a judgment in the suit in favor of the plaintiff for the sum of $500, together with attorney's fees, interest and costs.

It is urged that the trial court erred in holding that the affidavit filed in the replevin suit was conclusive on the question of value, and in sustaining objections to evidence offered by the defendant to show the real value of the piano. An examination of the testimony discloses that the trial court did not rule out any evidence offered by the defendant as to the value of the property on the theory that the affidavit was conclusive as against the defendant. The court did refuse to permit a witness who signed the affidavit in question to qualify or modify the statements made by the witness in his affidavit. In this ruling we think the court was correct.

We find from the evidence that plaintiff is entitled to recover in this action $500.00, the value of the piano, $95.83, interest on that sum from the time of the taking of the piano under the replevin writ to the date of this judgment, $50.00 for attorney's fees and $2.00 for appearance fee

the worth of whose testimony might well be regarded as doubtful. We think, however, that reversible error was not committed in admitting this evidence. The affidavit filed in the replevin suit by the defendant expressly fixed the value of the property at $300, and while this affidavit is contradicted by evidence of witnesses for the defendant, it is supported by the testimony of witnesses for the plaintiff. While, as urged, the statements contained in the affidavit are, under the authorities, to be regarded as at least prima facie proof of the value of the property in question, (Parson v. Gilbert, 85 Ill. App. 364) we think that taken together with the other evidence in the case, this admission is sufficient to warrant our entering a judgment in the suit in favor of the plaintiff for the sum of $300, together with attorney's fees, interest and costs.

It is urged that the trial court erred in holding that the affidavit filed in the replevin suit was conclusive on the question of value, and in sustaining objections to evidence offered by the defendant to show the real value of the piano. An examination of the testimony discloses that the trial court did not rule out any evidence offered by the defendant as to the value of the property on the theory that the affidavit was conclusive as against the defendant. The court did refuse to permit a witness who signed the affidavit in question to qualify or modify the statements made by the witness in his affidavit. In this ruling we think the court was correct.

We find from the evidence that plaintiff is entitled to recover in this action $300.00, the value of the piano, $95.83, interest on that sum from the time of the taking of the piano under the replevin writ to the date of this judgment, $30.00 for attorney's fees and $2.00 for appearance fee

in the Municipal court. Harts v. Wendell, 26 Ill. App. 274; Siegel v. Hanchett, 33 ibid, 634; Schott v. Youree, 41 ibid, 476; Hopkins v. Ladd, 35 Ill. 178.

The judgment of the Municipal court will be reversed and judgment entered here in favor of the plaintiff for the sum of $647.83 with costs here and in the trial court against the defendant.

REVERSED AND JUDGMENT HERE.

in the Municipal court. Marks v. Wendell, 25 Ill. App. 274; Siegel v. Hanchett, 35 Ibid. 634; Dumont v. Yourse, 41 Ibid. 476; Hopkins v. Lamb, 25 Ill. 178.

The judgment of the Municipal court will be reversed and judgment entered here in favor of the plaintiff for the sum of $647.85 with costs here and in the trial court against the defendant.

REVERSED AND JUDGMENT HERE.

393 - 23738

ANE C. JENSEN,
Appellant,

vs.

CHRISTIAN PETERSON and
AXEL A. BAUER,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 233

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Complainant sought by her bill in equity to obtain a decree declaring null and void a second trust deed, dated December 1, 1915, conveying certain premises to secure the payment of a principal note, with interest thereon, for the sum of $2,500. The Superior Court of Cook county dismissed complainant's bill for want of equity, and she brings the case here by appeal for review.

Complainant's husband died March 18, 1914. At the time of his death he was the owner of an equity in the property conveyed by the trust deed. The evidence shows that the premises were not occupied by complainant nor her husband at any time between the dates May 1, 1912, and March 1, 1916. The bill was filed March 9, 1916.

In her bill the complainant charged that shortly after the death of her husband the defendant Peterson represented to her that her deceased husband was indebted to him in the sum of $2,500, and that she advised Peterson to file his claim against the deceased's estate; that she, complainant, was ignorant and inexperienced in business affairs; that she had little knowledge of the English language and that, due to a long existing friendship between her family and the defendant Peterson, he, Peterson, after the death of her husband, became her confidential adviser in her business affairs; that she placed trust and confidence in him; that he

ANNE C. JENSEN,
Appellant,

vs.

CHRISTIAN PETERSON and
ANNE A. BAUER,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

Complainant sought by her bill in equity to obtain a decree declaring null and void a second trust deed, dated December 1, 1915, conveying certain premises to secure the payment of a principal note, with interest thereon, for the sum of $2,500. The superior Court of Cook county dismissed complainant's bill for want of equity, and she brings the case here by appeal for review.

Complainant's husband died March 16, 1916. At the time of his death he was the owner of an equity in the property conveyed by the trust deed. The evidence shows that the premises were not occupied by complainant nor her husband at any time between the dates May 1, 1915, and March 1, 1916. The bill was filed March 9, 1916.

In her bill the complainant charged that shortly after the death of her husband the defendant Peterson represented to her that her deceased husband was indebted to him in the sum of $2,500, and that she advised Peterson to file his claim against the deceased's estate; that she, complainant, was ignorant and inexperienced in business affairs; that she had little knowledge of the English language and that, due to a long existing friendship between her family and the defendant Peterson, Mr. Peterson, after the death of her husband, became her confidential adviser in her business affairs; that she placed trust and confidence in him; that he

was experienced in business affairs; that he advised her that it was her duty to pay or to secure the payment of her husband's debts; that if she would secure the payment of the debt due him, by the execution of a trust deed on the premises in question, her homestead interest therein would not be affected and that he would not part with the trust deed or notes; that on the faith of these promises she executed the trust deed and note referred to; that she had received no consideration therefor, and that they constituted a fraud upon her rights.

In his answer the defendant, Peterson alleged that at the time the trust deed was executed the deceased's estate and complainant were indebted to him in the sum of $5,517.78, which sum represented a balance due defendant for hay and feed purchased by complainant and her deceased husband.

At and before the time the trust deed and note in question were executed a claim was made by the defendant that the complainant was indebted to him for hay and feed furnished her and her deceased husband, who, at the time of his death, was the owner of record of the premises conveyed by the trust deed.

It appears from the record that if Peterson had filed his claim in the Probate court, and such claim had been allowed, the complainant would have realized, out of the estate of her husband, only her dower rights and her widow's award. On the evidence she was not entitled to a homestead right therein. The complainant was the sole legatee and distributee under the will of her deceased husband, and if Peterson's claim had been allowed against the estate she would have received a sum less than the value of her present equity in the premises. She was, Peterson asserts, jointly interested

was experienced in business affairs; that he advised her that it was her duty to pay or to secure the payment of her husband's debts; that if she would secure the payment of the debt due him, by the execution of a trust deed on the premises in question, her homestead interest therein would not be affected and that he would not part with the trust deed or notes; that on the faith of these promises she executed the trust deed and note referred to; that she had received no consideration therefor, and that they constituted a fraud upon her rights.

In his answer the defendant, Lawrence Alfred Lawrence, alleged that at the time the trust deed was executed the decedent's estate and complainant were indebted to him in the sum of $5,317.75, which sum represented a balance due defendant for hay and feed purchased by complainant and her deceased husband.

At and before the time the trust deed and note in question were executed a claim was made by the defendant that the complainant was indebted to him for hay and feed furnished her and her deceased husband, and, at the time of his death, was the owner of record of the premises conveyed by the trust deed.

It appears from the record that if Lawrence had filed his claim in the probate court, and such claim had been allowed, the complainant would have realized, out of the estate of her husband, only her dower rights and her widow's award. In the evidence she was not entitled to a homestead right therein. The complainant was the sole legatee and distributee under the will of her deceased husband, and if Lawrence's claim had been allowed against the estate she would have received a sum less than the value of her property, and in the premises. She was, therefore, manifestly interested

with her husband in the business conducted by him prior to his death.

There is evidence in the record that both complainant and her husband had on different occasions offered to convey the premises to Peterson in payment of their debt to him. The property in question was worth, at the time of Jensen's death, about $7,500, subject to a first mortgage given to secure the payment of $2,500.

It is admitted that the defendant Peterson was an intimate friend of complainant and her husband and that after the death of deceased the defendant had rendered much valuable service to her.

The theory of complainant's bill is that the trust deed and note in question should be set aside for want of consideration and because of fraud in procuring the execution thereof. It is conceded that a considerable sum of money was due defendant at the time of the death of complainant's husband. Defendant, after the death of complainant's husband, continuously represented to her that she was in some measure liable for this indebtedness. Several suggestions were made with reference to adjusting defendant's claim and while she insists that he refused to file the claim against the estate, the defendant says that his failure to file the claim in the Probate Court was due to the request of, and as the result of an understanding with, the complainant.

The chancellor heard the testimony of these witnesses and he was in a much better position to judge of their credibility than are we. It was conceded on the trial that the defendant was honest in his dealing with the complainant. Near the close of the teial the court indicated that he considered that the defendant's conduct was straightforward, and counsel for the complainant responded to this

with her husband in the business conducted by him prior to his death.

There is evidence in the record that both complainant and her husband had on different occasions offered to convey the premises to Peterson in payment of their debt to him. The property in question was worth, at the time of Tenney's death, about $7,500, subject to a first mortgage given to secure the payment of $2,500.

It is admitted that the defendant Peterson was an intimate friend of complainant and her husband and that after the death of deceased the defendant had rendered much valuable service to her.

The theory of complainant's bill is that the trust deed and note in question should be set aside for want of consideration and because of fraud in procuring the execution thereof. It is conceded that a considerable sum of money was due defendant at the time of the death of complainant's husband. Testimony, after the death of complainant's husband, continuously represented to her that she was in some measure liable for this indebtedness. Several suggestions were made with reference to satisfying defendant's claim and while she insists that he refused to file the claim against the estate, the defendant says that the failure to file the claim in the Probate Court was due to the request of, and as the result of an understanding with, the complainant.

The chancellor heard the testimony of many witnesses and he was in a much better position to judge of their credibility than are we. It was conceded on the trial that the defendant was honest in his dealing with the complainant. Near the close of the trial the court intimated that he considered that the defendant's conduct was straightforward, and counsel for the complainant responded to this

statement by saying that neither he nor Mrs. Jensen had the least desire to question defendant's honesty. Under the circumstances, it is perfectly clear that the conduct of defendant was in no sense fraudulent and that there was ample consideration for the execution of the trust deed and note in question.

While there is a dispute in the evidence as to the liability of complainant to defendant for the goods sold by him it is not denied that prior to the execution of the trust deed the defendant insisted upon the personal liability of complainant to him, and even though it might be held on a trial of this issue that the complainant was not in fact legally obligated to pay the debt owed to defendant, it is evident that the defendant was sincere in urging his claim against the complainant individually. Walker v. Shephard, 210 Ill. 112.

In Adams v. Grown Coal and Tow Company, 198 Ill. 445, it was held that a compromise of a doubtful right is sufficient to support a promise where there is an absence of fraud and the parties act in good faith.

The complainant was the sole legatee and distributee under the will of her husband, of his estate. No question is made that defendant's claim was not good and valid against the estate. The complainant became, therefore, directly interested in the adjustment of this claim, and we think that the execution of the trust deed and note in question was not against her best interests. In any event, if defendant's failure to file his claim against the estate was due to the request of the complainant, this fact furnished a sufficient consideration under the circumstances for the execution of the trust deed and note. Husband v. Spling, 81 Ill. 172.

statement by saying that neither he nor Mrs. Jensen had the least desire to question defendant's honesty. Under the circumstances, it is perfectly clear that the conduct of defendant was in no sense fraudulent and that there was ample consideration for the execution of the trust deed and note in question.

While there is a dispute in the evidence as to the liability of complainant to defendant for the goods sold by him it is not denied that prior to the execution of the trust deed the defendant insisted upon the personal liability of complainant to him, and even though it might be held on a trial of this issue that the complainant was not in fact legally obligated to pay the debt owed to defendant, it is evident that the defendant was sincere in urging his claim against the complainant individually. Walker v. Sargeant, 210 Ill. 312.

In Adams v. Brown Coal and Tow Company, 155 Ill. 445, it was held that a compromise of a doubtful right is sufficient to support a promise where there is an absence of fraud and the parties act in good faith.

The complainant was the sole legatee and distributee under the will of her husband, of his estate. No question is made that defendant's claim was not good and valid against the estate. The complainant became, therefore, directly interested in the adjustment of this claim, and we think that the execution of the trust deed and note in question was not against her best interests. In any event, if defendant's failure to file his claim against the estate was due to the request of the complainant, this fact furnished a sufficient consideration under the circumstances for the execution of the trust deed and note. Husband v. Epling, 81 Ill. 172.

The evidence shows that there was no lack of good faith in the conduct of the defendant Peterson. His conduct did not consist in the wrongful assertion of a claim. In Pyle v. Murphy, 180 Ill. App. 25, it was insisted that where "a party making the claim has no right at all then there is no consideration for the compromises." In answer to this contention, the court said:

> "If this proposition is confined to a legal right without reference to an investigation of the facts for the purpose of determining whether such right exists or not, then counsel is quite correct, but if the result is to depend upon what the facts in the particular case develop and no fraud or bad faith is shown to exist, then we think the position assumed is not a correct statement of the law as laid down by the more recent principles announced by our own Supreme Court. If a claimant in the settlement of a controversy obtains a compromise by fraud, duress or where no legal right ever existed for lack of incapacity of the party to sue, or otherwise, or where the matters sought to be compromised are of a criminal or unlawful character, then the consideration for any such compromise, whether the proof of such facts were for or against the claimant, would be unlawful and could not be enforced."

The decree of the Superior Court will be affirmed.

AFFIRMED.

The evidence shows that there was no lack of good faith in the conduct of the defendant [illegible]. Its conduct did not consist in the wrongful assertion of a claim. In Lyle v. Murphy, 18 Ill. App. 85, it was intimated that where "a party making the claim has no right at all then there is no [illegible] for the [illegible]." In answer to this contention, the court said:

> "If this proposition is confined to a legal right without reference to an investigation of the facts for the purpose of determining whether such right exists or not, then counsel is quite correct, but if the result is to depend upon what the facts in the particular case develop and as facts or not facts is about to exist, then we think the position assumed is not a correct statement of the law as laid down by the more recent principles announced in our own Supreme Court. If a claimant in the settlement of a contract, very obtains a compromise by fraud, duress or [illegible] to legal right exist existed for lack of mutuality of the party to one, or otherwise, or where the writers [illegible] to be compromised are of a criminal or unlawful character, then the consideration for any such compromise, and [illegible] the proof of such facts were for or against the claimant, would be unlawful and could not be enforced."

The decree of the superior court will be affirmed.

AFFIRMED.

400 - 23745

CARRIE MARTIN,
Appellee,

vs.

THE FARR BROTHERS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

211 I.A. 235

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Carrie Martin, brought suit in the Circuit Court of Cook county against The Farr Brothers Company, a corporation, for damages arising from personal injuries received by her October 6, 1914.

The declaration alleged that the plaintiff, with due care, was walking on 113th street in the city of Chicago, at its intersection with an alley; that the defendants named in the declaration were engaged in paving the alley and that in so doing they negligently left open and unguarded an excavation therein, into which plaintiff stepped and was thereby injured.

The evidence introduced on the trial tended to prove that the City of Chicago had entered into a contract with defendant, The Farr Brothers Company, for curbing, paving, etc., a system of streets, in which was included the alley in question; that the defendant, The Farr Brothers Company, thereafter entered into a contract with one Skoglund for doing the curbing work required under the contract; that in putting in the curbing at the place where the accident occurred a ditch had been dug and an opening created into which the plaintiff stepped while attempting to pass from the sidewalk on the south side of 113th street, across the alley. Skoglund, who was originally made a defendant in the action, was dismissed out of the case on motion of plaintiff during

CARRIE MARTIN, Appellee, vs. THE PARK BROTHERS COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

2 I L. App. 3d

MR. JUSTICE BRYAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Carrie Martin, brought suit in the circuit court of Cook county against the Park Brothers Company, a corporation, for damages arising from personal injuries received by her October 5, 1914.

The declaration alleges that the plaintiff, with due care, was walking on Lincoln avenue in the city of Chicago, at its intersection with an alley; that the defendants named in the declaration were engaged in paving the alley and that in so doing they negligently left open and unguarded an excavation therein, into which plaintiff stepped and was thereby injured.

The evidence introduced in the trial tended to prove that the City of Chicago had entered into a contract with defendant, The Park Brothers Company, for paving, etc., a system of streets, including the alley in question; that the defendant, The Park Brothers Company, thereafter entered into a contract with the Kingland for doing the curbing work required under the contract; that in putting in the curbing at the place where the accident occurred a ditch had been dug and an excavation made into which the plaintiff stepped while returning to the sidewalk on the south side of Lincoln street, across the alley. Kingland, who was originally made a defendant in the action, was dismissed out of the case on motion of plaintiff during

the trial. The jury brought in a verdict in favor of the plaintiff for the sum of $1,500. Judgment was entered upon this verdict and the defendant brings the case here by appeal for review.

It is contended that no evidence was heard on the trial which tended to prove the material allegations of the declaration. The negligence charged is that an excavation was negligently permitted to remain in the alley, at its intersection with 113th street, and that this excavation was left unguarded and unprotected and made dangerous for pedestrians who were compelled to use the street and sidewalk, and also that defendant negligently failed to place signal lights about theopening.

There is some conflict in the evidence as to whether an opening had been left in the alley at and just before the time of the accident in question. The evidence introduced by the plaintiff tended to prove that a trench about 15 inches deep and 14 inches wide at the top had been dug in the alley and was left open and unguarded at and before the time plaintiff sustained the injuries she complains of. There is also evidence tending to contradict the testimony of these witnesses and which tended to show that there was no hole in the alley at the point where the accident happened at any time on the day in question. Sufficient evidence was introduced of the existence of the excavation and its unprotected condition to support the verdict of the jury. Witnesses testified that the alley was dark at the time of the accident and that there were no barriers or lights which might serve as a protection or warning to pedestrians crossing the alley at the place in question.

The defendant sublet the curbing work required under his contract to Skoglund, and it may be conceded that

the trial. The jury brought in a verdict in favor of the plaintiff for the sum of $1,500. Judgment was entered upon this verdict and the defendant brings the case here by appeal for review.

It is contended that no evidence was heard on the trial which tended to prove the material allegations of the declaration. The negligence charged is that an excavation was negligently permitted to remain in the alley, at its intersection with 115th street, and that this excavation was left unguarded and unprotected and made dangerous for pedestrians who were compelled to use the street and sidewalk, and also that defendant negligently failed to place signal lights about it, respectively.

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The defendant sublet the curbing work required under his contract to Skeyland, and it may be conceded that

Skoglund did the curbing work in the alley under this contract with the defendant. Under its contract with the City the defendant corporation agreed to "erect and maintain strong and suitable barriers, and, during the night time, such lights as will effectively prevent any accident or harm to life, limb, or property in consequence of such digging up, use or occupancy of said street, highway or public grounds, and the contractor shall be liable for all damages occasioned by or resulting from the digging up, use or occupancy of said street, alley, highway or public grounds." Primarily, under its contract, the duty of protecting pedestrians using the public highway at the point in question rested upon the defendant. Its contract was with a municipal corporation, a state agencye existing and created for the protection and in the interest of the people. Its, defendant's, possession of the alley in question was solely for the purpose of properly performing the service required by it under the contract, and as a part of this service it was required to protect the public in the manner provided by the contract. This it failed to do, and it seeks to absolve itself on the theory that it had delegated to another contractor the doing of a part of the work required by the contract. Stated differently, it seeks to be relieved of liability under the so-called "independent contractor rule." We think the contention of defendant is well answered in the case of Chicago B. & I. Co. v. La Mantia, 112 Ill. App. 43, where this court said:

> "The statement of facts shows that in its contract with the Sanitary District appellant stipulated it would pay all damages for personal injuries resulting from its wrongful acts or from the wrongful acts of any of its employees. The work to be done under this contract necessarily obstructed and encumbered the public highway and unavoidably rendered that highway unsafe for

Skogland did the curbing work in the alley under this contract with the defendant. Under its contract with the City the defendant corporation agreed to "erect and maintain strong and suitable barriers, and, during the night time, such lights as will effectively prevent any accident or harm to life, limb, or property in consequence of such digging up, use or occupancy of said street, highway or public grounds, and the contractor shall be liable for all damages occasioned by or resulting from the digging up, use or occupancy of said street, alley, highway or public grounds." Primarily, under its contract, the duty of protecting pedestrians using the public highway at the point in question rested upon the defendant. Its contract was with a municipal corporation, a state agency existing and created for the protection and in the interest of the people. Its, defendant's, possession of the alley in question was solely for the purpose of properly performing the service required by it under the contract, and as a part of this service it was required to protect the public in the manner provided by the contract. This it failed to do, and it seeks to absolve itself on the theory that it had delegated to another contractor the doing of a part of the work required by the contract. Stated differently, it seeks to be relieved of liability under the so-called "independent contractor rule." We think the contention of defendant is well answered in the case of Chicago R. & I. Co. v. Ma Mantis, 114 Ill. App. 43, where this court said:

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public travel. In such a case the generally understood doctrine of 'independent contractor' does not apply. The rule which governs is this: The case is to be viewed and the liability is to be determined as it would be if the work had been done by appellant, and not by the subcontractor. We are committed to this rule by the opinion in Met. W. S. Ry. Co. v. Dick, 87 Ill. App. 40. Without further comment we adhere to the rule as there laid down. In so holding we are in accord with the Supreme Court of the United States. (Water Co. v. Ware, 16 Wall. 566.)"

Our attention has not been directed to any decision of the Supreme Court of this State which deals directly with this question. There are, however, substantial reasons why the "independent contractor rule" should not be invocable in cases of this kind. The performance of the repaving and curbing work required under the contract would of necessity render the alley dangerous to pedestrians crossing it in passing along the south side of 113th street. That the parties to the contract recognized this fact is evident by the protective measures provided by it. The subcontractor, Skoglund, was employed by defendant to do the curbing work provided for in the contract, and it is clear that the performance of this work and the tearing up and excavation of the alley would, if the measures provided in the contract for the protection of the public were disregarded, cause the alley at the point where the accident happened to become inherently dangerous and hazardous to pedestrians using it. The law charges the defendant with knowledge of these facts, and it is not permitted under the circumstances to invoke the protection of the "independent contractor rule."

In the Village of Jefferson v. Chapman, 127 Ill. 438, the Supreme Court held that -

"One who authorizes a work which is necessarily dangerous and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury."

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Other questions are raised by the defendant as to the admissibility of evidence and the ruling of the trial court upon instructions, as to which we think no reversible error was committed.

The judgment of the trial court will be affirmed.

AFFIRMED.

Other questions are raised by the defendant as to the admissibility of evidence and the ruling of the trial court upon instructions, as to which we think no reversible error was committed.

The judgment of the trial court will be affirmed.

AFFIRMED.

492 - 23837

MESA MELON GROWERS ASSOCIATION,
HENRY and ROBINSON,
Appellants,

vs.

EDWARD BYRNES,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

211 I.A. 236

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, Edward Byrnes, an attorney-at-law, represented, as attorney, Mesa Melon Growers Association of Mesa, Arizona, in certain litigation which resulted in a verdict and judgment in favor of the association for the sum of $24,000, in which judgment Byrnes had an interest under a contingent fee contract.

Defendant was also the legal representative of a large number of cantaloupe growers in California and Colorado, who, through their assignee, one Kunihiro, pressed certain alleged claims against railways and others in the Federal courts in Chicago and in California. About the beginning of the year 1915 an effort was made to settle the litigation last above referred to and a cash offer of $150,000 appears to have been made to settle the suits begun in the name of Kunihiro. Shortly before the time this offer was made, the petitioners Henry & Robinson, attorneys at law, became interested in assisting the defendant in his effort to prosecute and adjust the claims and law suits which grew out of them and an effort was made to collect the judgment for $24,000 referred to. Nothing of advantage to defendant seems to have resulted from their employment. Law suits were begun in New York, Pittsburgh, Cincinnati and Chicago, the results of which were in no way beneficial to the defendant or his clients. Necessary and incidental ex-

[illegible] A SOCIATION,
[illegible] and [illegible],
Appellees,

vs.

[illegible] BROWN BROTHERS,
Appellee.

[illegible]

[illegible]. [illegible] DEMURRER [illegible] [illegible].

The defendant, Howard Brown, an attorney-at-law, represented, as alleged, [illegible] Association, in certain litigation which resulted in a verdict and judgment in favor of the [illegible] for the sum of $[illegible], in which judgment there was an interest under a contingent fee contract.

Referred was also the [illegible] representative of a large number of contributors [illegible] and [illegible], who, through their [illegible], [illegible] certain alleged claims against [illegible] in the federal courts [illegible]. [illegible] beginning of the year 1929 an effort was made to settle the litigation just above referred to [illegible] of $150,000 appears to have been [illegible] in the name of [illegible]. Shortly [illegible] the offer was made, the [illegible] at law, became interested in [illegible] effort to prosecute and adjust the claims and law suits which grew out of them and an effort was made to collect the judgment for $[illegible] referred to. [illegible] advice [illegible] defendant seems to have resulted from their employment. Law suits were begun in New York, Pittsburgh, Cincinnati and Chicago, the results of which were in no way beneficial to

penses, which were large, occasioned by these suits, were paid by Byrnes and to some extent by petitioners.

Differences arose between Byrnes and Henry & Robinson, and on different occasions both Henry and Robinson threatened to sever their connections with the several matters and cases in which Byrnes was then interested as attorney.

On November 1, 1915, Byrnes began an attachment suit in the Circuit court of Cook County against his client, Mesa Melon Growers' Association, the National Surety Company being made a party thereto as garnishee. In this litigation Henry & Robinson appeared as attorneys for Byrnes and judgment was entered against the defendant. The garnishee filed an answer in this suit. In November, 1916, the defendant Byrnes moved in court to substitute H. J. Toner as his attorney in this litigation, for Henry & Robinson. This motion was subsequently withdrawn. A motion was thereafter made to amend the proceedings in the case in such manner that it be made to appear therein that the suit was brought by Byrnes for the use of Henry & Robinson. This motion was granted and subsequently vacated by the court, and thereafter Henry & Robinson were permitted to file an intervening petition in the suit. The allegations of the petition were traversed by Byrnes; on a trial of the issues joined a verdict and judgment were entered in favor of the defendant Byrnes, and by this appeal Henry & Robinson seek to reverse this judgment.

The printed brief and argument filed by Henry & Robinson consists of 115 pages, of which 109 pages contain what is practically copies of parts of the record and of the abstract. In view of the long record made on the trial a brief of this sort is of little or no aid to this court.

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On November 1, 1918, Byrnes began an attachment suit in the Circuit court of Cook County against his client, Mess Helen Crowers' Association, the National Surety Company being made a party thereto as garnishee. In this litigation Henry & Robinson appeared as attorneys for Byrnes and judgment was entered against the defendant. The garnishee filed an answer in this suit. In November, 1918, the defendant Byrnes moved in court to substitute H. J. Toner as his attorney in this litigation, for Henry & Robinson. This motion was subsequently withdrawn. A motion was thereafter made to amend the proceedings in the case in such manner that it be made to appear therein that the suit was brought by Byrnes for the use of Henry & Robinson. This motion was granted and subsequently vacated by the court, and thereafter Henry & Robinson were permitted to file an intervening petition in the suit. The allegations of the petition were traversed by Byrnes; on a trial of the issues joined a verdict and judgment were entered in favor of the defendant Byrnes, and by this appeal Henry & Robinson seek to reverse this judgment.

The printed brief and argument filed by Henry & Robinson consists of 113 pages, of which 108 pages contain what is practically copies of parts of the record and of the abstract. In view of the long record made on the trial a brief of this sort is of little or no aid to this court.

We will not consider the point raised as to whether, under the proceedings, the court had the right or power to determine the claim made by Henry & Robinson as set out in their petition, as we think from our examination of the record that the verdict and judgment was, on the evidence, correct. It may be conceded at the outset that one who interpleads in a cause "is simply let in for the purpose of establishing his right to the property or funds in dispute." Glover v. Wells, 40 Ill. App., 350.

We have examined the evidence introduced on the trial as it appears in the abstract of record, and we are convinced that under the evidence the intervening petitioners, Henry & Robinson, were not entitled to the funds sought to be recovered by the defendant from his former client, Mesa Melon Growers' Association. It is quite true that the intervening petitioners performed much service and expended some money in the litigation in connection with which they had been employed, but we are unable to find in the evidence any basis for the claim that their relation with the defendant was such that it should be held that they were entitled to an equitable assignment of any interest which the defendant had in the litigation in question. Long quotations of this evidence appear in the briefs of counsel, covering in all about 100 pages, yet the intervening petitioners have failed to point out just where or how in these long extracts the evidence tends to sustain their contention that they had obtained an assignment of any interest the defendant had in the litigation and matters referred to.

In the argument of petitioners it is insisted that an action at law must be begun in the name of the nominal plaintiff, and that the addition of the name of the beneficial plaintiff is simply to protect his interests as

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"We have examined the evidence introduced on the trial as it appears in the abstract of record, and we are convinced that under the evidence the intervening petitioners, Henry & Robinson, were not entitled to the funds sought to be recovered by the defendant from his former client, Rees Hodson Growers' Association. It is quite true that the intervening petitioners performed much service and expended some money in the litigation in connection with which they had been employed, but we are unable to find in the evidence any basis for the claim that their relation with the defendant was such that it should be held that they were entitled to an equitable assignment of any interest which the defendant had in the litigation in question. Long quotations of this evidence appear in the brief of counsel, covering in all about 100 pages, yet the intervening petitioners have failed to point out just where or how in these long extracts the evidence tends to sustain their contention that they had obtained an assignment of any interest the defendant had in the litigation and matters referred to.

In the argument of petitioners it is insisted that an action at law must be begun in the name of the nominal plaintiff, and that the addition of the name of the beneficial plaintiff is simply to protect his interests as

against the nominal plaintiff. This may be conceded. Byrnes was not a mere nominal plaintiff in the litigation begun by him. He brought suit to recover for services rendered by him to his client, and while, in a proper case, it might be held that Byrnes was indebted to the plaintiffs for such aid, if any, as they gave him, this fact in and of itself would not authorize the court to substitute any claim which the petitioners might have against Byrnes for his claim against his client.

It is contended that Byrnes assigned to petitioners his interest in the judgment in favor of the Mesa Melon Growers' Association for the $24,000 referred to. This claim in part grows out of a conversation had between Byrnes, Henry and Robinson, about October 8, 1915. At this time Henry and Robinson were pressing Byrnes for payment of certain moneys advanced by them and they threatened to withdraw from the litigation in which they had, up to that time, performed certain services. If Henry's version of this conversation be true, it appears that Byrnes was unable to meet the demands then made upon him by petitioners; that he sought to convince them that he would be able to and would pay their claim as soon as he had obtained his interest in the $24,000 judgment referred to; that they were averse to accepting this suggestion and that it was finally agreed that Byrne's claim for an interest in the judgment should be enforced by the beginning of an attachment suit in his name, and that he, Byrnes, said, "Just consider it your claim now, only commence the suit in my name; I would not want anybody to think I had assigned any claim," and that the petitioners assented to this and the attachment suit was begun. Notwithstanding this

against the nominal plaintiff. This may be conceded. Byrnes was not a mere nominal plaintiff in the litigation begun by him. He brought suit to recover for services rendered by him to his client, and while, in a proper case, it might be held that Byrnes was indebted to the plaintiffs for such aid, if any, as they gave him, this fact in and of itself would not authorize the court to substitute any claim which the petitioners might have against Byrnes for his claim against his client.

It is contended that Byrnes assigned to petitioners his interest in the judgment in favor of the Dean Melon Growers' Association for the $24,000 referred to. This claim in part grows out of a conversation had between Byrnes, Henry and Robinson, about October 8, 1910. At this time Henry and Robinson were pressing Byrnes for payment of certain moneys advanced by them and they threatened to withdraw from the litigation in which they had, up to that time, performed certain services. If Henry's version of this conversation be true, it appears that Byrnes was unable to meet the demands then made upon him by petitioners; that he sought to convince them that he would be able to and would pay their claim as soon as he had obtained his interest in the $24,000 judgment referred to; that they were averse to accepting this suggestion and that it was finally agreed that Byrnes's claim for an interest in the judgment should be enforced by the beginning of an attachment suit in his name, and that he, Byrnes, said, "Just consider it your claim now, only commence the suit in my name; I would not want anybody to think I had assigned any claim," and that the petitioners assented to this and the attachment suit was begun. Notwithstanding this

statement of the witness, he followed it by saying that it was agreed that petitioners were to have only one-third of anything they might recover on Byrne's behalf in this suit, and petitioner Robinson testified that Byrnes said, "I will give you half of whatever sum will be realized out of the Mesa Melon Growers' Association case, as a fee, a contingent fee that we were to get out of it,for the prosecution of the case of Byrnes v. Mesa Melon Growers' Association;" that Henry spoke up and said, "No, Ed, I think half will be too much, and we will go into the case on a contingent fee of one-third."

In Cameron v. Boeger, 200 Ill. 84, it was held that -

> "Where there is an agreement by a party to pay his attorney a reasonable compensation for his legal services out of the proceeds of litigation, such agreement depending as it does upon the mere responsibility of the employer, does not operate as an equitable assignment of any portion of the fund sought to be recovered in the suit."

Much of the material testimony given by petitioners is directly contradicted by Byrnes and others. Byrnes directly denied the language attributed to him by petitioners, or that he at any time had assigned any part of his interest in the judgment referred to. The jury and court who heard these witnesses were in a much better position than are we to determine their credibility, and we are unable to say that the conclusions reached by the jury and the court on the evidence were erroneous.

Other questions are raised by petitioners as to which we think no reversible error was made.

The judgment of the trial court will be affirmed.

AFFIRMED.

statement of the witness, he followed it by saying that it was agreed that petitioners were to have only one-third of anything they might recover on Byrne's behalf in this suit, and petitioner Robinson testified that Byrne said, "I will give you half of whatever you will be realized out of the Rose Melon Growers' Association case, as a fee, a contingent fee that we were to get out of it for the prosecution of the case of Byrnes v. Rose Melon Growers' Association;" that Henry spoke up and said, "No, No, I think half will be too much, and we will go into the case on a contingent fee of one-third."

In Cameron v. Cooper, [illegible] 111, [illegible] held that -

> "Where there is no agreement by a party to pay his attorney a reasonable compensation for his legal services out of the proceeds of litigation, such attorney depending as it does upon the mere responsibility of the employer, does not operate as an equitable assignment of any portion of the fund sought to be recovered in the suit."

Much of the material testimony given by petitioners is directly contradicted by witnesses, and others. Wrong directly denied the language attributed to them by petitioners, or that he at any time had any part in the interest in the judgment referred to. The Jury and Court who heard these witnesses and in a [illegible] position to [illegible] determine their credibility, and we are [illegible] to say that the conclusions reached by the jury and the court in the evidence were erroneous.

Other questions are raised by petitioners [illegible] which we think no reversible error was made.

The judgment of the lower court will be affirmed.

AFFIRMED.

513 - 23858

PERCY N. LAWRENCE,
Appellant,

vs.

LAYTON O. SHERMAN et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

211 I.A. 237

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant by his bill, as amended, sought an injunction against the defendants. To this a general demurrer was filed, which was sustained by the chancellor and an order entered dismissing the bill for want of equity. From this order complainant appeals.

The bill asserts that the defendant Sherman claimed to have invented a valuable process for refining crude oil, and entered into negotiations with Frederick C. Norris, one of the defendants, who interested the defendants W. E. D. Stokes and Ellis T. Crawford, residents of New York City. Samples of the gasoline produced by the process were sent to Stokes and Crawford, who exhibited these to the complainant, Lawrence, who was a broker in business in New York City. Lawrence represented that he had a client engaged in the refining business who might become a licensee for the use of the process. Stokes and Crawford went to Chicago, and there met Sherman and Norris, and on July 9, 1915, the four of them entered into a contract by which Norris, Crawford, Stokes and Sherman became joint owners of the process, and Stokes and Crawford were authorized to sell or license the same under royalty contracts and pay a broker's commission, except that the right for a 3,000 barrel plant was reserved. The bill asserts that this contract was executed in order to satisfy Lawrence as to the authority of

ERNEST H. LAWRENCE, Appellant,	
vs.	
LAYTON O. SHERMAN et al., Appellees.	

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

Complainant by his bill, as amended, sought an injunction against the defendants. To this a general demurrer was filed, which was sustained by the chancellor and an order entered dismissing the bill for want of equity. From this order complainant appeals.

The bill asserts that the defendant Sherman claimed to have invented a valuable process for refining crude oil, and entered into negotiations with Frederick C. Morris, one of the defendants, who interested the defendants W. T. Stokes and Ellis P. Crawford, residents of New York City. Samples of the gasoline produced by the process were sent to Stokes and Crawford, who exhibited these to the complainant, Lawrence, who was a broker in business in New York City. Lawrence testified that he had a client engaged in the refining business who might become a licensee for the use of the process. Stokes and Crawford went to Chicago, and there met Sherman and Morris, on or about July 3, 1915, the four at once entered into a contract by which Morris, Crawford, Stokes and Sherman became joint owners of the process, and Stokes and Crawford were authorized to sell or license the same under exclusive contracts and keep a broker's commission, except that the right for a 3, 10 barrel plant was reserved. The bill asserts that this contract was executed in order to satisfy Lawrence as to the authority of

Stokes and Crawford, who on returning to New York showed the contract to him and informed him that they were then ready to contract with him. On August 10th an agreement was entered into between Stokes and Crawford, acting for themselves and as agents for Norris and Sherman, parties of the first part, and complainant Lawrence, party of the second part. In this agreement the contract of July 9th was referred to as having theretofore been entered into by the parties of the first part, and a copy of this was annexed to and made a part of the agreement of August 10th. It was asserted that this was done at the request of Lawrence. The August 10th contract also provided that Lawrence should introduce the parties of the first part to a responsible party who would deal as principal for the acquisition of the rights by license or otherwise, to use the process, etc., referred to in the contract of July 9th, upon terms satisfactory to the parties of the first part, and that the parties of the first part were willing to compensate the party of the second part for such introduction. Lawrence agreed to introduce the first parties to a party financially and commercially able to deal as principal, and upon terms satisfactory to the first parties, for the right to use the process upon a royalty basis, with a guaranteed minimum to be fixed by future agreement between the first parties and such licensee, together with satisfactory assurances and guaranties of performance and payment, to be agreed upon thereafter in such contract to be made by the parties so introduced. The first parties agreed that within four months from July 9, 1915, they would not enter into negotiations or contractual relations with the corporation to which they were introduced by Lawrence, without compensating him in case such negotiations resulted in an operative agreement, by

Stokes and Crawford, who on returning to New York showed the contract to him and informed him that they were then ready to contract with him. On August 10th an agreement was entered into between Stokes and Crawford, acting for themselves and as agents for Morris and Akerman, parties of the first part, and complainant Lawrence, party of the second part. In this agreement the contract of July 9th was referred to as having theretofore been entered into by the parties of the first part, and a copy of this was annexed to and made a part of the agreement of August 10th. It was asserted that this was done at the request of Lawrence. The August 10th contract also provided that Lawrence should introduce the parties of the first part to a responsible party who would deal as principal for the acquisition of the rights by license or otherwise, to use the process, etc., referred to in the contract of July 9th, upon terms satisfactory to the parties of the first part, and that the parties of the first part were willing to compensate the party of the second part for such introduction. Lawrence agreed to introduce the first parties to a party financially and commercially able to deal as principal, and upon terms satisfactory to the first parties, for the right to use the process upon a royalty basis, with a guaranteed minimum to be fixed by future agreement between the first parties and such licensee, together with satisfactory assurances and guarantees of performance on payment, to be agreed upon thereafter in such contract to be made by the parties so introduced. The first parties agreed that within four months from July 9, 1913, they would not enter into negotiations or contractual relations with the corporation to which they were introduced by Lawrence, without communicating him in case such negotiations resulted in an operative contract, by

paying him 20% of the royalties, but the first parties reserved the right to negotiate and do business with other parties without any obligation to pay Lawrence any sum whatever; Lawrence was to receive as compensation for his services 20% of the royalties paid by the licensee to be produced by him - "said payment is to be made only if, as and when received, and not otherwise, by said parties of the first part." It was further agreed that the royalty contract with the licensee should contain suitable provisions with respect to the amount of rate of royalty to be paid, and the time and manner, ascertainment of quantities, the guaranteed minimum, etc., and satisfactory assurances of the financial responsibility of the licensee; also that the agreement should be subject to a demonstration or test under conditions to be set forth in such proposed agreement between the first parties and the licensee. The contract also contained a provision that there was no other or different agreement or understanding between the first parties and the party of the second part than this agreement of August 10th; also that the authority conferred upon Lawrence should not extend beyond September 9, 1915, and that no claim should be made by him against the first parties or any of them for any compensation for his services or efforts unless the same shall have resulted in a final and operative agreement between the parties of the first part and the licensee on or before September 9, 1915, except that in case Lawrence before that time should produce a person or corporation at any time ready, able and willing to enter into such license agreement upon terms satisfactory to the first parties, and the first parties have not theretofore made any binding contract with other parties for the use of said process, the party of the

paying him 20% of the royalties, but the first parties reserved the right to negotiate and do business with other parties without any obligation to pay Lawrence any sum whatever; Lawrence was to receive as compensation for his services 20% of the royalties paid by the licensee to be produced by him - "said payment is to be made only if, as and when received, and not otherwise, by said parties of the first part." It was further agreed that the royalty contract with the licensee should contain suitable provisions with respect to the amount of rate of royalty to be paid, and the time and manner, ascertainment of quantities, the guaranteed minimum, etc., and satisfactory assurances of the financial responsibility of the licensee; also that the agreement should be subject to a demonstration or test under conditions to be set forth in such proposed agreement between the first parties and the licensee. The contract also contained a provision that there was no other or different agreement or understanding between the first parties and the party of the second part than this agreement of August 10th; also that the authority conferred upon Lawrence should not extend beyond September 2, 1919, and that no claim should be made by his against the first parties or any of them for any compensation for his services or efforts unless the same shall have resulted in a final and operative agreement between the parties of the first part and the licensee on or before September 2, 1919, except that in case Lawrence before that time should produce a person or corporation at any time ready, able and willing to enter into such license agreement upon terms satisfactory to the first parties, and the first parties have not theretofore made any binding contract with other parties for the use of said process, the party of the

second part should be entitled to receive his 20% commission.

The bill asserts that after the execution of this agreement and before September 9th, Lawrence introduced Stokes and Crawford to the Texas Company as a prospective licensee; that its manager stated his company desired to witness a demonstration or test; that the making of this test was delayed from time to time by Sherman on one pretext or another until January, 1916, when Sherman notified Stokes that he was ready to make a demonstration for the Texas Company, and this company sent its representative to witness the same; that at the appointed time Sherman met Stokes and the representative of the Texas Company and informed them that he could not make the test because the defendants William H. Isom and Joseph M. Cudahy, officers of the Cudahy Refining Company, and the Cudahy Refining Company, owned the demonstrating plant in which Sherman had been making his tests and would not permit said tests or demonstrations to be made. It is also asserted by the bill that at the time of the execution of the contract of July 9th Isom, Cudahy and the Cudahy Refining Company had knowledge of the Sherman process and had given property and materials to Sherman that he might perfect it, under an agreement with him that upon its perfection they should have the right to operate a 3,000 barrel plant with said process, by virtue of the provisions of the July 9th contract withholding therefrom the right to operate a 3,000 barrel plant. Subsequently Isom, Cudahy and one Harry F. Sinclair, with other persons, organized the Sinclair Oil and Refining Corporation for the purpose of using the Sherman process, in which they were assisted by Sherman. The bill also asserts that Isom, Cudahy, the Cudahy Refining Company and the

second part should be entitled to receive the full commission.

The bill asserts that after the execution of this agreement and before September 9th, Lawrence introduced Stokes and Crawford to the Texas Company as a prospective licensee; that the manager stated his company desired to witness a demonstration or test, that the making of this test was delayed from time to time by reason of one pretext or another until January , 1917, when Lawrence notified Stokes that he was ready to make a demonstration for the Texas Company, and this company sent its representative to witness the same; that at the appointed time Lawrence, Stokes and the representative of the Texas Company and its formed them that he could not [illegible] the test because the Tandarte Milling Co., Inc. and [illegible] Company, officers of the Cudahy Refining Company, and the Cudahy Refining Company, owned the demonstration plant in which Lawrence had been making his tests and would not permit said tests or demonstrations to be made. It is also asserted by the bill that [illegible] the execution of the contract [illegible] Cudahy and the Cudahy Refining Company [illegible] process and had given royalty and [illegible] perfect it, under an agreement with [illegible] tion they should have the right to complete [illegible] plant with such process, [illegible] of the July 9th contract [illegible] operate a 3,000 barrel [illegible] Harry P. Sinclair, with offices [illegible] Refining Corporation for the [illegible] process, in which they were assisted by [illegible] and the bill also asserts that Lawrence, Cudahy, the Cudahy Refining Co., and the

Sinclair Oil Corporation are all now using the Sherman process, and that they are negotiating with the Texas Company to license it to use the process.

The prayer of the bill is that Sherman, Isom, Cudahy, the Cudahy Refining Company and the Sinclair Oil Corporation be enjoined from manufacturing or employing the Sherman process; that an accounting be taken of all dealings between Sherman and these last named parties and that they be required to account for any illegal or unauthorized use of the process; that Sherman be enjoined from making any contract or agreement of any nature to convey the right to use said process, and that the defendants be enjoined from using the process under any contract executed prior to the date of filing of the bill of complaint, unless such contract were executed under the agreement of July 9, 1915.

We are of the opinion that the demurrer was rightly sustained and the bill dismissed, for the reason that complainant is not shown to have had any interest in the Sherman process which would entitle him to the relief he seeks. His rights arise solely out of the contract of August 10th. In unambiguous terms this is simply a broker's contract. He agrees to introduce the parties owning the Sherman process to a responsible party who may enter into negotiations looking to a licensee's contract on a royalty basis, upon such terms as the owners and the prospective licensee may be able to agree upon. The rights of the owners to negotiate with other parties in the meantime is definitely reserved, and Lawrence's compensation is conditioned solely upon the owners and his client concluding their negotiations by a final and operative agreement and the receipt by the owners of payment of the royalties under such contract. It appears from the bill that the owners, as

Sinclair Oil Corporation are all now using the Sherman process, and that they are negotiating with the Texas Company to license it to use the process.

The prayer of the bill is that Sherman, Inc., Cudahy, the Cudahy Refining Company and the Sinclair Oil Corporation be enjoined from manufacturing or employing the Sherman process; that an accounting be taken of all dealings between Sherman and these last named parties and that they be required to account for any illegal or unauthorized use of the process; that Sherman be enjoined from making any contract or agreement of any nature to convey the right to use said process, and that the defendants be enjoined from using the process under any contract executed prior to the date of filing of the bill of complaint, unless such contract were executed under the agreement of July 9, 1913.

We are of the opinion that the demurrer was rightly sustained and the bill dismissed, for the reason that complainant is not shown to have had any interest in the Sherman process which would entitle him to the relief he seeks. His rights arise solely out of the contract of August 10th. In unambiguous terms this is simply a broker's contract. He agrees to introduce the parties owning the Sherman process to a responsible party who may enter into negotiations looking to a licensee's contract on a royalty basis, upon such terms as the owners and the prospective licensee may be able to agree upon. The rights of the owners to negotiate with other parties in the meantime is definitely reserved, and Lawrence's compensation is conditioned solely upon the owners and his client concluding their negotiations by a final and operative agreement and the receipt by the owners of payment of the royalties under such contract. It appears from the bill that the owners, as

they had a right to do, entered into contractual relations with other parties than the party produced by Lawrence. Upon the happening of such an event Lawrence had agreed that he should receive no compensation.

No reasonable theory is suggested upon which Lawrence can base his claim that by the transactions above stated he acquired an interest in the Sherman process. No argument predicated upon the assertion that the process was a secret one known to Sherman alone, can avail. The cases cited by counsel for complainant hold that one who through fiduciary relations acquires from another a trade secret, cannot be permitted to use this information to the harm of that one. They do not apply to this case, for two reasons: (1) Complainant has acquired no trade secret from Sherman or anyone else; neither has Sherman, who invented the process. (2) It is not claimed that knowledge of the socalled "secret" of the process has been gained through abuse of confidence or used improperly.

Reduced to its simplest terms, the claim of plaintiff is that because he had knowledge of the existence of a secret process for refining oil, and undertook as a broker to bring the owner and a prospective licensee together, he became a part owner in the process itself. This claim has no greater merit than would the claim of a real estate broker to an interest in the real estate towards the sale of which he had rendered service.

We cannot assent to the contention that because in the contract with complainant dated August 10, 1915, reference is made to the contract of July 9th, to which complainant was not a party, he thereby became a party thereto. The reference is simply to identify the subject-matter of the August 10th contract

they had a right to do, entered into contractual relations with other parties than the party produced by Lawrence. Upon the happening of such an event Lawrence had agreed that he should receive no compensation.

No reasonable theory is suggested upon which Lawrence can base his claim that by the transactions above stated he acquired an interest in the Sherman process. No argument predicated upon the assertion that the process was a secret one known to Sherman alone, can avail. The cases cited by counsel for complainant hold that one who through fiduciary relations acquires from another a trade secret, cannot be permitted to use this information to the harm of that one. They do not apply to this case, for two reasons: (1) Complainant has acquired no trade secret from Sherman or anyone else; neither has Sherman, who invented the process. (2) It is not claimed that knowledge of the so-called "secret" of the process has been gained through abuse of confidence or used improperly.

Reduced to its simplest terms, the claim of plaintiff is that because he had knowledge of the existence of a secret process for refining oil, and undertook as a broker to bring the owner and a prospective licensee together, he became a part owner in the process itself. This claim has no greater merit than would the claim of a real estate broker to an interest in the real estate towards the sale of which he had rendered service.

We cannot assent to the contention that because in the contract with complainant dated August 10, 1915, reference is made to the contract of July 9th, to which complainant was not a party, he thereby became a party thereto. The reference is simply to identify the subject-matter of the August 10th contract

and to recognize the authority of Stokes and Crawford to contract on behalf of themselves and Sherman and Norris.

For the reasons above indicated we hold that the order of the chancellor dismissing the bill was right and it is affirmed.

AFFIRMED.

and to recognize the authority of States and Crowlers to contract on behalf of themselves and Sherman and Morris.

For the reasons above indicated we hold that the order of the chancellor dismissing the bill was right and it is affirmed.

AFFIRMED.

534 - 23879

RALPH NEUFELD, (Complainant) Appellee,	
vs.	
MATILDA S. GUDICHSEN et al., (Defendants).	APPEAL FROM
NILSON BROTHERS, a corp., (Cross-Complainant) Appellee,	CIRCUIT COURT,
vs.	
MATILDA S. GUDICHSEN et al., (Cross-Defendants).	COOK COUNTY.
On Appeal of MATILDA S. GUDICHSEN.	

211 I.A. 238

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant, Ralph Neufeld, filed a bill to foreclose a second mortgage trust deed made by the defendant Matilda S. Gudichsen, covering a flat building owned by her. Nilson Brothers filed an intervening petition and cross-bill seeking to establish a mechanic's lien. There was also another lien claimant, about which there seems to be no controversy. The cause was referred to a master in chancery, who took evidence and reported recommending a decree in favor of the complainant, Neufeld, and finding that Nilson Brothers was entitled to its lien. Exceptions were filed and overruled by the chancellor, who entered a decree in accordance with the recommendations of the master.

Defendant asserts two defenses: (1) Neufeld, claiming to be the legal holder of the notes secured by the trust deed, exercised the option therein expressed to declare the whole of the indebtedness immediately due and payable because of a breach of the covenants and agreements

534 - 25879

RALPH NEUFELD, (Complainant) Appellee,	
vs.	
MATILDA S. GUDICHSEN et al., (Defendants).	APPEAL FROM
NILSON BROTHERS, a corp., (Cross-Complainant) Appellee,	CIRCUIT COURT,
vs.	
MATILDA S. GUDICHSEN et al., (Cross-Defendants).	COOK COUNTY.
On Appeal of MATILDA S. GUDICHSEN.	

MR. JUSTICE MOSURRY DELIVERED THE OPINION OF THE COURT.

Complainant, Ralph Neufeld, filed a bill to foreclose a second mortgage trust deed made by the defendant Matilda S. Gudichsen, covering a flat building owned by her. Nilson Brothers filed an intervening petition and cross-bill seeking to establish a mechanic's lien. There was also another lien claimant, about which there seems to be no controversy. The cause was referred to a master in chancery, who took evidence and reported recommending a decree in favor of the complainant, Neufeld, and finding that Nilson Brothers was entitled to its lien. Exceptions were filed and overruled by the chancellor, who entered a decree in accordance with the recommendations of the master.

Defendant asserts two defenses: (1) Neufeld, claiming to be the legal holder of the notes secured by the trust deed, exercised the option therein expressed to declare the whole of the indebtedness immediately due and payable because of a breach of the covenants and agreements

therein contained, and defendant asserts that Neufeld was not the legal holder of the notes. (2) Because of usury the defendant should not be charged with interest. The facts which appear show that neither of these defenses has merit.

The notes, executed by the defendant Matilda S. Gudichsen and her husband, were given to secure the payment of twenty notes for $200 each and one note for $1,000. The notes and trust deed were delivered to one Charles Chapman as part payment on his contract with the Gudichsens for the masonry work on the building conveyed by the trust deed. This contract provided for the payment of $10,230 in cash; in addition Chapman was to receive other money for extra work. The trust deed and notes were given to Chapman before any other payment was made to him. Chapman sold the notes and trust deed to the complainant, Neufeld. The evidence shows that the Gudichsens made payments to Chapman on account of his contract, but when this was finally closed it was shown that Chapman had been overpaid to the extent of $1,000. The master therefore recommended that the $1,000 note secured by the trust deed should be canceled, leaving the amount of notes under the trust deed at $4,000. The decree so provides, and the amount found due thereby, both principal and interest, is upon the basis of a $4,000 indebtedness, and the defendant admits this amount of indebtedness.

It is not important that Neufeld gave possession of the $1,000 note to Chapman as security in connection with other matters; Neufeld was still its owner. But even if this were not true, the decree declares it a nullity and of no effect. It is not contended that Neufeld was not in every

therein contained, and defendant asserts that Neufeld was not the legal holder of the notes. (2) Because in equity the defendant should not be charged with interest. The facts which appear show that neither of these defenses has merit.

The notes, executed by the defendant Lillie S. Gudlohsen and her husband, were given to secure the payment of twenty notes for $200 each and one note for $1,000. The notes and trust deed were delivered to one Charles Chapman as part payment on his contract with the Gudlohsens for the masonry work on the building mortgaged by the trust deed. This contract provided for the payment of $10,250 in cash; in addition Chapman was to receive other money for extra work. The trust deed and notes were given to Chapman before any other payment was made to him. Chapman sold the notes and trust deed to the complainant, Neufeld. The evidence shows that the Gudlohsens made payments to Chapman on account of his contract, but when this was finally closed it was shown that Chapman had been overpaid to the extent of $1,000. The master therefore recommended that the $1,000 note secured by the trust deed should be cancelled, leaving the amount of notes under the trust deed at $4,000. The decree so provides, and the amount found due thereby, both principal and interest, is more than the whole of a $4,000 indebtedness, and the defendant owns this amount of indebtedness.

It is not important that Neufeld were possession of the $1,000 note to Chapman as security in connection with other matters; Neufeld was still the owner. But even if this were not true, the decree declares it a nullity and of no effect. It is not contended that Neufeld was not in every

sense the legal holder of the other notes secured by the trust deed.

A further consideration is that at the time of the decree all the notes had matured. Amounts which become due pending a hearing on foreclosure may properly be included in the decree. Wolcott v. Lake View B. & L. Ass'n, 59 Ill. App. 415, and cases there cited; also Brown v. Miner, 128 Ill. 148.

These facts also dispose of the question of usury, which is defined to be an illegal profit required and received by a lender of a sum of money from the borrower. Bouvier's Law Dict. There is here merely the fact of overpayment to Chapman, occurring after the sale of the notes and trust deed to Neufeld. This mistake was corrected by canceling the $1,000 note. The claim of usury has no substantial basis.

It is said that Nilson Brothers is not entitled to a lien for the reason that it installed other plumbing fixtures than those it had contracted to install. The evidence does not support this. The contract does not call for fixtures made by any particular manufacturer, and the testimony of Herman Gudichsen, the husband, that August Nilson orally agreed to put in "Federal-Huber" fixtures is contradicted by Nilson. Both the Gudichsens frequently observed the installation of the plumbing, and made no objection to the character of the equipment. Furthermore, a final certificate was issued showing the amount due, and the Gudichsens told Nilson Brothers that the money called for by the certificate was with the people making the loan, and that Nilson Brothers should have it. August Nilson testified that the

sense the legal holder of the other notes secured by the trust deed.

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These facts also dispose of the question of usury, which is defined to be an illegal profit required and received by a lender of a sum of money from the borrower. Bonviler's Law Dict. There is here merely the fact of overpayment to Chapman, occurring after the sale of the notes and trust deed to Mayfield. This mistake was corrected by cancelling the $1,000 note. The claim of usury has no substantial basis.

It is said that Wilson Brothers is not entitled to a lien for the reason that it installed other plumbing fixtures than those it had contracted to install. The evidence does not support this. The contract does not call for fixtures made by any particular manufacturer, and the testimony of Herman Gudikesen, the husband, that August Wilson orally agreed to put in "Federal-Mogul" fixtures is contradicted by Wilson. Both the Gudikesens frequently observed the installation of the plumbing, and made no objection to the character of the equipment. Furthermore, a final certificate was issued showing the amount due, and the Gudikesens told Wilson Brothers that the money called for by the certificate was with the people making the loan, and that Wilson Brothers should have it. August Wilson testified that the

Federal-Huber and Wolff goods were about the same grade and that one was about the same price as the other, varying sometimes with different jobs, and that it made no particular difference to Nilson Brothers which it installed, as one was as good as the other. We are of the opinion that the master found the proper amount due Nilson Brothers and that the decree in this respect is correct.

There was no error in charging the defendant with the amount of solicitor's fees charged, or with the costs before the master. The evidence shows that the fees were reasonable and customary, and the payment of such fees was provided for by the trust deed. As to the expenses of the litigation, it is the general rule that the loser pays, and we see no abuse of discretion on the part of the chancellor in following the general rule.

We are of the opinion that the decree entered was a proper one, and it is affirmed.

AFFIRMED.

Federal-Huber and Wolff goods were about the same grade and that one was about the same price as the other, varying sometimes with different jobs, and that it made no particular difference to Wilson Brothers which it installed, as one was as good as the other. We are of the opinion that the master found the proper amount due Wilson Brothers and that the decree in this respect is correct.

There was no error in charging the defendant with the amount of solicitor's fees charged, or with the costs before the master. The evidence shows that the fees were reasonable and customary, and the payment of such fees was provided for by the trust deed. As to the expenses of the litigation, it is the general rule that the loser pays, and we see no abuse of discretion on the part of the chancellor in following the general rule.

We are of the opinion that the decree entered was a proper one, and it is affirmed.

AFFIRMED.

341 - 23307

HOWARD S. GEMMILL, Admr. of the estate of Anton Czerner,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

211 I.A. 246

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in a personal injury suit in which appellant was charged with negligence whereby appellee's intestate, a minor 12 or 13 years old, lost his life. Several cogent reasons are presented for reversal, including the claim that the negligence charged was not the proximate cause of the injury, and that there was a fatal variance, and that the statute of limitations had run. But none of these points need be considered in view of our conclusion that the minor's contributory negligence defeated the right to recover.

The facts as to how the accident happensd are not disputed. The boy went with other boys upon the right of way and tracks used by appellant to pick up coal. While there they saw an approaching freight train and as it passed, moving about 6 miles per hour, he attempted to get on one of the cars that contained coal. One of the boys with him, testifying for plaintiff, described the accident as follows: "We seen the train and then we got between the first and second track and stood there, about 3 feet from the engine as it went by. We continued to stand there while the train was passing. The

341 - 23307

HOWARD S. GEMMILL, Adm. of the estate of Anton Oxenrer, Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE SABATH DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in a personal injury suit in which appellant was charged with negligence whereby appellee's intestate, a minor 12 or 13 years old, lost his life. Several cogent reasons are presented for reversal, including the claim that the negligence charged was not the proximate cause of the injury, and that there was a fatal variance, and that the statute of limitations had run. But none of these points need be considered in view of our conclusion that the minor's contributory negligence defeated the right to recover.

The facts as to how the accident happened are not disputed. The boy went with other boys upon the right of way and tracks used by appellant to pick up coal. While there they saw an approaching freight train and as it passed, moving about 6 miles per hour, he attempted to get on one of the cars that contained coal. One of the boys with him, testifying for plaintiff, described the accident as follows: "We seen the train and then we got between the first and second track and stood there, about 3 feet from the engine as it went by. We continued to stand there while the train was passing. The

train came by and Tony, the boy that was killed, got on the train first. He had one foot on the train and one hand on, just about to get on with his other foot, when he tripped over a tie and then he went under. That is all that I seen." He also testified that Tony had been with the boys upon the tracks at other times. There was no evidence that Tony did not possess the average intelligence of one of his age. It cannot reasonably be claimed that one of his age having such experience and ordinary intelligence would not be aware of the danger of attempting to climb on a car moving at such speed. In the light of these facts, which cannot be lightly disregarded, showing unmistakable negligence on his part, we think the court should have given an instructed verdict for defendant company regardless of any other question in the case. It is enough merely to refer to other similar cases where the courts have reached the same conclusion. (LeBeau v. P. C. C. & St. L. Ry. Co., 69 Ill. App. 557; Fitzgerald v. C. B. & Q. R. R., 114 id. 118; Rothschild v. Levy, 118 id. 78; Hanna v. I. C. Ry. Co., 129 id. 134; Rayfield v. Sans Souci Park, 147 id. 493; Koehler v. Chicago Ry. Co., 166 id. 574.)

In the Fitzgerald case, citing the LeBeau case, the court said that a boy 12 years of age, of ordinary intelligence, knows that it is dangerous to attempt to get on a moving freight train. In the Hanna case a boy 12 years of age was presumed to have the capacity to comprehend and avoid a danger he was in a place to incur several times before. As was said in the Rayfield case reasonable minds can reach only one conclusion from the evidence, namely, that the boy "did not exercise ordinary care, but, on the contrary, was guilty of negligence which caused the accident."

REVERSED WITH FINDING OF FACT

train came by and Tony, the boy that was killed, got on the train first. He had one foot on the train and one hand on, just about to get on with his other foot, when he tripped over a tie and then he went under. That is all that I seen." He also testified that Tony had been with the boys upon the tracks at other times. There was no evidence that Tony did not possess the average intelligence of one of his age. It cannot reasonably be claimed that one of his age having such experience and ordinary intelligence would not be aware of the danger of attempting to climb on a car moving at such speed. In the light of these facts, which cannot be lightly disregarded, showing unmistakable negligence on his part, we think the court should have given an instructed verdict for defendant company regardless of any other question in the case. It is enough merely to refer to other similar cases where the courts have reached the same conclusion. (Lehman v. R. C. R. R. Co., 59 Ill. App. 527; Fitzgerald v. R. R. Co., 111 Ill. 118; Rothschild v. Levy, 112 id. 75; Hanna v. L. R. R. Co., 128 id. 164; Mayfield v. Sam. Sound Work, 147 id. 495; Koehler v. Chicago Ry. Co., 166 id. 574.)

In the Fitzgerald case, citing the Lehman case, the court said that a boy 12 years of age, of ordinary intelligence, knows that it is dangerous to attempt to get on a moving freight train. In the Hanna case a boy 12 years of age was presumed to have the capacity to comprehend and avoid a danger he was in a place to know several times before. As was said in the Mayfield case reasonable minds can reach only one conclusion from the evidence, namely, that the boy did not exercise ordinary care, but, on the contrary, was guilty of negligence which caused the accident."

341 - 23307

FINDING OF FACT.

We find that the deceased, Anthony Czerner, came to his death through contributory negligence on his part while attempting to climb upon a moving car on appellant's tracks.

341 - 33307

FINDING OF FACT.

We find that the deceased, Anthony Cearner, came to his death through contributory negligence on his part while attempting to climb upon a moving car on appellant's tracks.

73 - 23404

MARY ELIZABETH TRUMBULL,
Defendant in Error,

vs.

WILLIAM H. BRYANT,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 247

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

At the close of evidence in this case the court denied defendant's and allowed plaintiff's motion for an instructed verdict.

The suit was for rent claimed to have accrued under a lease for certain months after a time when defendant claimed that there was a surrender of the premises. His was the only evidence on that subject, and undisputed. It left no question of facts at issue and presented circumstances which we think in fact and law constituted a surrender of the premises with plaintiff's acquiescence.

His testimony was in substance that he had vacated the premises some months before he gave up the keys thereof to plaintiff, that he had paid rent up to that time, that the keys were given up at plaintiff's request, defendant stating at the time of surrendering them that in so doing he was to be released from further obligations, and that plaintiff took and retained the keys without dissenting from that proposition and without demanding any further rent until about nine months later when this suit was brought. Under such undisputed testimony and circumstances we think the evidence showed that plaintiff took the keys upon the understanding that by so doing she was accepting defendant's proposition to

MARY ELIZABETH TRUMBULL, Defendant in error,	ERROR TO
vs.	MUNICIPAL COURT
WILLIAM H. BRYANT, Plaintiff in error.	OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

At the close of evidence in this case the court denied defendant's and allowed plaintiff's motion for an instructed verdict.

The suit was for rent claimed to have accrued under a lease for certain months after a time when defendant claimed that there was a surrender of the premises. His was the only evidence on that subject, and undisputed. It left no question of fact at issue and presented circumstances which we think in fact and law constituted a surrender of the premises with plaintiff's acquiescence.

His testimony was in substance that he had vacated the premises some months before he gave up the keys thereof to plaintiff, that he had paid rent up to that time, that the keys were given up at plaintiff's request, defendant stating at the time of surrendering them that in so doing he was to be released from further obligations, and that plaintiff took and retained the keys without dissenting from that proposition and without demanding any further rent until about nine months later when this suit was brought. Under such undisputed testimony and circumstances we think the evidence showed that plaintiff took the keys upon the understanding that by so doing she was accepting defendant's proposition to

surrender the premises and terminate the lease. The judgment will be reversed.

REVERSED WITH FINDING OF FACT.

surrender the premises and terminate the lease. The judgment will be reversed.

REVERSED WITH FINDING OF FACT.

FINDING OF FACT.

We find that no rent was due under the lease in question but that said lease was terminated, and that appellee, Mary E. Trumbull, accepted the surrender of the premises so leased from appellant, Wm. H. Bryant, the lessee, before the period for which such rent was claimed.

FINDING OF FACT.

We find that no rent was due under the lease in question but that said lease was terminated, and that appellee, Mary A. Trumbull, accepted the surrender of the premises so leased from appellant, Wm. H. Bryant, the lessee, before the period for which such rent was claimed.

113 - 23453

211 I.A. 248

MARY LAWSON,
Defendant in Error,

vs.

DR. A. WILBERFORCE WILLIAMS,
sued as A. Wilerfore Williams,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The striking of the bill of exceptions from the files leaves before us the question whether the judgment can stand on the common law or clerk's record. The verdict was for a tortious conversion of plaintiff's property and the judgment was entered thereon. There are no averments in the statement of claim to which such a verdict is responsive. In fact it is impossible to determine from the plaintiff's statement of claim the pleader's theory of the cause of action. Said statement begins by saying that plaintiff's claim is "for money due and received by defendant from moneys withdrawn from the Illinois Trust & Savings Bank from October 15, 1897 to August 11, 1903." Then follows averments that in each year from 1903 to 1915, inclusive, defendant promised to pay plaintiff "the moneys so due her from withdrawals made by him from said bank." Thus far the averments suggest the theory of assumpsit. But the pleader then concludes with the averment "yet though often requested defendant has not paid plaintiff said money * * * but has fraudulently and feloniously withdrawn said moneys from said bank and converted same to his own use." While the statement of claim contains no averments of fact to support a

113 - 23423

MARY LAWSON,
Defendant in Error,

vs.

DR. A. WILHELMROCK WILLIAMS,
sued as A. Wilfore Williams,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The striking of the bill of exceptions from the file leaves before us the question whether the judgment can stand on the common law or clerk's record. The verdict was for a tortious conversion of plaintiff's property and the judgment was entered thereon. There are no averments in the statement of claim to which such a verdict is responsive. In fact it is impossible to determine from the plaintiff's statement of claim the pleader's theory of the cause of action. Said statement begins by saying that plaintiff's claim is "for money due and received by defendant from moneys withdrawn from the Illinois Trust & Savings Bank from October 15, 1897 to August 11, 1903." Then follows averments that in each year from 1900 to 1913, inclusive, defendant promised to pay plaintiff "the moneys so due her from withdrawals made by him from said bank." Thus far the averments suggest the theory of assumpsit. But the pleader then concludes with the averment "yet though often requested defendant has not paid plaintiff said money * * * but has fraudulently and feloniously withdrawn said moneys from said bank and converted same to his own use." While the statement of claim contains no averments of fact to support a

felonious withdrawal of the money, yet such conclusion implies a withdrawal without plaintiff's authority or consent, and so a withdrawal of the bank's money and not hers. The verdict, therefore, is not responsive to the statement of claim, which neither avers nor states facts to show that her money was converted to defendant's own use, and concludes with a statement inconsistent with such a theory.

Had the verdict been responsive to the averments in assumpsit we might disregard the other averments. But inasmuch as the statement of claim does not state the elements of a tort, and the verdict finds defendant guilty of one, the judgment cannot stand and must be reversed and the cause will be remanded.

REVERSED AND REMANDED.

felonious withdrawal of the money, yet such conclusion implies a withdrawal without plaintiff's authority or consent, and so a withdrawal of the bank's money and not here. The verdict, therefore, is not responsive to the statement of claim, which neither avers nor states facts to show that her money was converted to defendant's own use, and concludes with a statement inconsistent with such a theory.

Had the verdict been responsive to the averments in assumpsit we might disregard the other averments. But inasmuch as the statement of claim does not state the elements of a tort, and the verdict finds defendant guilty of one, the judgment cannot stand and must be reversed and the cause will be remanded.

REVERSED AND REMANDED.

152 - 23495

211 Ill. App. 250

OLIVE M. NELSON,
Appellant,

vs.

SOCIETY NORDSTJERNA,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff as nearest relative of her deceased husband who was a member of the defendant society, sued for the death benefits that accrue from the society on the death of a member in good standing. Under its rules and by-laws assessments were levied on each member for death benefits to relatives of deceased members. A notice of an assessment levied for such benefits was duly mailed to plaintiff's husband on March 7, 1916, to his last known address, given as "4925 State Street", presumably meaning Chicago, where the society and its members met. The by-laws were in the Swedish language, and there was some conflict over what was the correct translation into English. The preponderance of evidence, however, was that they provided for an automatic suspension of any member who failed to pay a death benefit assessment within the prescribed time for payment, which was before the third regular meeting after the society received official notice of such death. The third regular meeting after receiving such official notice and after transmitting same to plaintiff's husband as aforesaid, was held May 5th. On May 8th, plaintiff's husband died and had not paid such assessment. By virtue of the rules, therefore, the right to death benefits from his membership was forfeited, if notice of the assessment

152 - 24295

OLIVE M. KNIGHT, Appellant,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
SOCIETY COMMITTEE, Appellee.	

MR. PRESIDING JUSTICE MCGURN DELIVERED THE OPINION OF THE COURT.

Plaintiff as mother and guardian of her deceased husband who was a member of the defendant society, sued for the death benefits that accrue from the society on the death of a member in good standing. Under its rules and by-laws assessments were levied on each member for death benefit to relatives of deceased members. A notice of an assessment levied for such benefits was duly mailed to plaintiff's husband on March 7, 1918, to his last known address, given as "4235 State street", presumably meaning Chicago, where the society and its members met. The by-laws were in the English language, and there was some conflict over what was the correct translation into English. The preponderance of evidence, however, was that they provided for an automatic suspension of any member who failed to pay a death benefit assessment within the prescribed time for payment, which was before the third regular meeting after the society received official notice of such death. The third regular meeting after receiving such official notice and after transmitting same to plaintiff's husband as aforesaid, was held May 5th. On May 8th, plaintiff's husband died and had not paid such assessment. By virtue of the rules, therefore, the right to death benefits from his membership was forfeited. If notice of the assessment

aforesaid was duly given and received. We think there was *prima facie* proof of due mailing and of the receiving of such notice through the mail. There was also proof of the fact that before May 5th, the deceased actually knew of such assessment and that his rights as a member would then be forfeited unless the assessment was paid and that he did not intend to pay it. This tended to corroborate his receipt of notice mailed to him. We think, therefore, that the court before whom the case was tried without a jury, was justified in finding a verdict for defendant.

AFFIRMED.

aforesaid was duly given and received. We think there was prima facie proof of the mailing and of the receiving of such notice through the mail. There was also proof of the fact that before May 8th, the deceased actually knew of such assessment and that his rights as a member would thus be forfeited unless the assessment was paid and that he did not intend to pay it. This tended to corroborate his receipt of notice mailed to him. We think, therefore, that the court before whom the case was tried without a jury, was justified in finding a verdict for defendant.

AFFIRMED.

166 - 23509

211 I.A. 251

G. W. FARRAND,
Appellant,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corp.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee for damages for alleged breach of contract to carry safely and without negligence a shipment of hogs from Pukwana, S. D., to the stock yards in Sioux City, Iowa. The court's findings were for appellee and we cannot say that the evidence did not warrant the court's conclusions.

We find nothing in the record to show negligence by appellee. Some of the hogs when delivered were frozen. This was accounted for by the extreme low temperature at the time of their transportation, and delays ensuing from severe weather conditions.

The transportation was in January, 1916. Appellant had on the morning before loading the hogs brought them by wagon a distance of 23 miles to the point of shipment. It was very cold at the time and getting colder. Falling snow and temperature and increased velocity of the wind interfered with operation of trains. The one in question was for a time stalled in a snow bank, and in addition to delay from necessary slower locomotion, to expedite which the tonnage was reduced so that perishable freight only was forwarded after the train was stalled, there was seemingly unavoidable

166 - 23309

G. W. MARGARD,
Appellant,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corp.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellant used appellee's cars for a stock breach of contract to carry safely and without negligence a shipment of hogs from Hawkens, S. D., to the stock yards in Sioux City, Iowa. The court's findings were for appellee and we cannot say that the evidence did not warrant the court's conclusions.

We find nothing in the record to show negligence by appellee. Some of the hogs when delivered were frozen. This was accounted for by the extreme low temperature at the time of their transportation, and delays ensuing from severe weather conditions.

The transportation was in January, 1916. Appellant had on the morning before loading, the hogs brought from a wagon a distance of 12 miles to the point of shipment. It was very cold at the time and getting colder. Falling snow and temperature and increased velocity of the wind interfered with operation of trains. The one in question was for a time stalled in a snow bank, and in addition to delay from necessary slower locomotion, to expedite which the tonnage was reduced so that perishable freight only was forwarded after the train was stalled, there was seemingly unavoidable

delay at two points of transfer, at the first by waiting for the first regular train, and at the second by reason of frozen switches and frozen ash pans on the engines. The temperature had fallen to 18 degrees below zero, the wind had reached a velocity of 37 miles per hour, and nearly 6 inches of snow had fallen. The delays and loss seemed attributable to conditions over which appellee had no control, and appellee seems to have done all that was practicable to prevent delay or disaster from them. It does not appear that there was any neglect by way of unnecessary exposure of the stock by the company, but in contrast, it appears that had plaintiff, who accompanied his stock, exercised the same precaution as another shipper of hogs who transported some by the same train without loss, and furnished more straw and corn for his stock, he too would have met with no loss. We see no good grounds for disturbing the court's conclusions.

AFFIRMED.

delay at two points of transfer, at the first by waiting for the first regular train, and at the second by reason of frozen switches and frozen sub pans on the engines. The temperature had fallen to 16 degrees below zero, the wind had reached a velocity of 27 miles per hour, and nearly 6 inches of snow had fallen. The delays and loss seemed attributable to conditions over which appellee had no control, and appellee seems to have done all that was practicable to prevent delay or disaster from them. It does not appear that there was any neglect by way of unnecessary expenses of the stock by the company, but in contrast, it appears that had plaintiff, who accompanied his stock, exercised the same precaution as another shipper of hogs who transported some by the same train without loss, and furnished more straw and corn for his stock, he too would have met with no loss. We see no good grounds for disturbing the trial court's conclusions.

AFFIRMED.

193 - 23536

ELI L. NISSLY et al.,
Appellants,

vs.

M. WAINER,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 234

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee was sued for a balance of account for $36, and pleaded by way of set off, a breach of contract by appellant for failure to deliver as per agreement 1500 lbs. of tobacco leaf at 12¢ per lb., which, at the time of failure to deliver, was worth 22¢ per lb., whereby appellee lost $150. The parties filed a stipulation as to the facts, which admitted the claims of the respective parties, as pleaded, and that plaintiff was a nonresident of this state, but reserved as the only question for this court the propriety of appellee's set off. Appellant claimed it is for unliquidated damages and that they cannot be set off against a nonresident plaintiff. This court has decided to the contrary in another case and we adhere to the views there expressed. (Ideal Coated Paper Co. v. Samuel Cupples Envelope Co., 169 Ill. App. 484.) While we think the set off thus stated and agreed upon may be regarded as in the nature of liquidated damages, yet if unliquidated they were properly allowed under the decision cited.

In view of the fact that the court deducted plaintiff's undisputed claim from the unquestioned amount of appellee's set off, leaving no question except the authority

ALI I. MISSLY et al.,
Appellants,

vs.

M. WALDRN,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HAEBE
DELIVERED THE OPINION OF THE COURT.

Appellee was sued for a balance of account for 150, and plaintiff by way of set off, a breach of contract by appellant for failure to deliver as per agreement 1500 lbs. of tobacco leaf at 12¢ per lb., which, at the time of failure to deliver, was worth 22¢ per lb., whereby appellee lost $150. The parties filed a stipulation as to the facts, which admitted the claims of the respective parties, as pleaded, and that plaintiff was a nonresident of this state, but reserved as the only question for this court the propriety of appellee's set off. Appellant claimed it is for unliquidated damages and that they cannot be set off against a nonresident plaintiff. This court has decided to the contrary in another case and we adhere to the views there expressed. (Ideal Cooked Paper Co. v. Samuel Cupples Envelope Co., 109 Ill. App. 44.) While we think the set off thus pleaded and agreed upon may be regarded as in the nature of liquidated damages, yet if liquidated they were properly pleaded under the decision cited.

In view of the fact that the court deducted plaintiff's undisputed claim from the unquestioned amount of appellee's set off, leaving no question except the authority

of the court to entertain the set off we shall disallow appellee's motion to strike the stipulation from the record for alleged irregularity in certification.

AFFIRMED.

of the court to entertain the set off as small disallow appellee's motion to strike the stipulation from the record for alleged irregularity in certification.

AFFIRMED.

211 - 23555

M. BLICKSTEIN,
Appellee,

vs.

THE CHICAGO & ALTON RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question involved on this appeal is whether or not the verdict and judgment were warranted by the evidence. Plaintiff shipped by the defendant carrier from Dwight to Chicago 19 horses, one of which was dead when the train arrived, the only fact on which plaintiff relied for recovery. It was shown by defendant's witnesses not only that the train was not roughly handled in any way but that the company furnished suitable means of transportation and exercised that degree of care which the nature of the property required. There was a decided preponderance of evidence that the horse in question came to its death either from the viciousness of the other horses in the car or its lack of vitality, for neither of which, in the absence of negligence on its part, is the carrier, under the law, responsible. (I. & St. L. Ry. Co. v. Jurey, 8 Ill. App. 160; Burke v. U. S. Exp. Co., 87 id. 505; C. R. I. & P. R. R. Co. v. Harmon, 12 id. 54; I. C. R. R. Co. v. Brelsford, 13 id. 251; Libro v. C. C. C. & St. L. R. Co., 202 id. 418; Colsch v. C. M. & St. P. R. Co., 153 N. W. 327.)

The shipper loaded his horses without tying them, and they were kicking and biting one another from the time they were loaded. Defendant's employes saw the horse down at different places en route and endeavored to get him up,

M. HLICKSTEIN, Appellee,	
vs.	APPEAL FROM
THE CHICAGO & ALTON RAILROAD COMPANY, a corporation, Appellant.	MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The only question involved on this appeal is whether or not the verdict and judgment were warranted by the evidence. Plaintiff shipped by the defendant carrier from Dwight to Chicago 13 horses, one of which was dead when the train arrived, the only fact on which plaintiff relied for recovery. It was shown by defendant's witnesses not only that the train was not roughly handled in any way but that the company furnished suitable means of transportation and exercised that degree of care which the nature of the property required. There was a decided preponderance of evidence that the horse in question came to its death either from the viciousness of the other horses in the car or its lack of vitality, for neither of which, in the absence of negligence on its part, is the carrier, under the law, responsible. (I. & M. R. R. Co. v. Dorey, 8 Ill. App. 107; Burke v. U. S. Exp. Co., 87 Id. 609; C. I. & L. R. R. Co. v. Harmon, 12 Id. 84; I. C. R. R. Co. v. Freiberg, 16 Id. 61; Libre v. C. C. C. & St. L. R. R. Co., 200 Id. 41; Coleman v. C. B. & Q. R. R. Co., 152 M. App. 327.)

The shipper loaded his horses with at value then, and they were kicking and biting one another from the time they were loaded. Defendant's employes saw the horse down

without success, doing seemingly all that was practicable to that end. Under the circumstances the company could not have been required to unload the horses and thus delay and interfere with transporting the freight in the other 30 cars in the train. It also appears that the horse in question was much smaller and in a much poorer condition than the rest of the horses, and though standing when the train started, was unable from its size and physical condition to withstand the viciousness of the other horses. Of this the shipper took the risk. We find no evidence whatever of neglect by the carrier.

REVERSED WITH FINDING OF FACT.

without success, doing seemingly all that was practicable to that end. Under the circumstances the company could not have been required to unload the horses and thus delay and interfere with transporting the freight in the other 30 cars in the train. It also appears that the horse in question was much smaller and in a much poorer condition than the rest of the horses, and though standing when the train started, was unable from its size and physical condition to withstand the violenceness of the other horses. In this the shipper took the risk. We find no evidence whatever of neglect by the carrier.

REVERSED WITH FINDING OF FACT.

211 - 23555

FINDING OF FACT.

We find that appellant, the Chicago & Alton Railroad Company, a corporation, was not guilty of the negligence charged in the statement of claim, and that the horse in question came to his death by means of its physical weakness and violence suffered from other horses with which it was shipped.

211 - 23595

FINDING OF FACT.

We find that appellant, the Chicago & Alton Railroad Company, a corporation, was not guilty of the negligence charged in the statement of claim, and that the horse in question came to his death by means of its physical weakness and violence suffered from other horses with which it was shipped.

252 - 23597

KATE M. WEST,
Appellee,

vs.

J. A. McNAUGHTON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 261

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On June 21st, 1917, a judgment by confession was entered herein for rent and attorney's fees. Shortly after the entry of judgment a motion was presented to have the same vacated, supported by affidavits setting up facts purporting to show a meritorious defense. A counter affidavit was filed, claiming that the right to rent under the lease had been adjudicated in a previous judgment for rent due for two previous months under the lease. The trial judge consulted the files and the record in the other case, and denied the motion, holding that the matter had been adjudicated. In this we think the court erred as the matter of res judicata cannot be determined in that way.

The real question is whether or not the court abused its discretion. The main fact relied upon as a meritorious defense was that the lessee tendered the lessor a desirable tenant who was ready, able and willing to pay the rental stipulated for in the lease for a portion of its term in order that he might minimize his loss, and alleged that the lessee had abandoned the premises. We do not think that the lessor was bound to accept a new tenant for only a portion of the unexpired term of the lease, if he was obliged to accept the tenant at all. Hence

KATE M. WEST,
Appellee,

vs.

J. A. MONAUGHTON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On June 4th, 1917, a judgment by confession was entered herein for rent and attorney's fees. Shortly after the entry of judgment a motion was presented to have the same vacated, supported by affidavits setting up facts purporting to show a meritorious defense. A counter affidavit was filed, claiming that the right to rent under the lease had been adjudicated in a previous judgment for rent due for two previous months under the lease. The trial judge consulted the files and the record in the other case, and denied the motion, holding that the matter had been adjudicated. In this we think the court erred as the matter of res judicata cannot be determined in that way.

The real question is whether or not the court abused its discretion. The main fact relied upon as a meritorious defense was that the lessee tendered the lessor a desirable tenant who was ready, able and willing to pay the rental stipulated for in the lease for a portion of its term in order that he might minimize his loss, and alleged that the lessee had abandoned the premises. We do not think that the lessor was bound to accept a new tenant for only a portion of the unexpired term of the lease. If he was obliged to accept the tenant at all. Hence

we do not think the denial of the motion amounted to an abuse of discretion. The judgment will be affirmed.

AFFIRMED.

we do not think the denial of the motion amounted to an abuse of discretion. The judgment will be affirmed.

AFFIRMED.

264 - 23609

211 I.A. 262

LEONARD ROCHIS,
Appellee,

vs.

VINCENT MILASCEWICZ,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This action was to recover damages for violation of an oral agreement to procure a policy of fire insurance, which the defendant denied making.

The cause was heard without a jury or submission of any propositions of law, thus leaving little basis for several of the points argued. The court's finding and judgment were in plaintiff's favor for $800 and costs.

The points made by appellant are that there was no contract, nor proper proof of damages, no tendered premium, and negligence by appellee in not procuring a policy elsewhere.

Plaintiff testified that about February 1st, 1915, he went to the office of appellant, an insurance agent, and made application for a fire insurance policy to the amount of $1000 on his house, on which he had previously obtained through appellant a tornado policy; that the agent then took down the data for the policy and told him the premium would be about $35, but that he need not pay it until the policy arrived; that about March 1st he inquired of appellant whether the policy had arrived and the latter said it had not but assured him that he would get it; that his house burned up on the 29th of that

264 - 25609

LEONARD ROCHIS,
Appellee,

vs.

VINCENT MILACOSKICZ,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211A.292

MR. PRESIDING JUSTICE HARKNESS
DELIVERED THE OPINION OF THE COURT.

This action was to recover damages for violation of an oral agreement to procure a policy of fire insurance, which the defendant denied making.

The cause was heard without a jury or submission of any propositions of law, thus leaving little basis for several of the points argued. The court's finding and judgment were in plaintiff's favor for $800 and costs.

The points made by appellant are that there was no contract, nor proper proof of damages, no tendered premium, and negligence by appellee in not procuring a policy elsewhere.

Plaintiff testified that about February 1st, 1915, he went to the office of appellant, an insurance agent, and made application for a fire insurance policy to the amount of $1000 on his house, on which he had previously obtained through appellant a tornado policy; that the agent then took down the data for the policy and told him the premium would be about $35, but that he need not pay it until the policy arrived; that about March 1st he inquired of appellant whether the policy had arrived and the latter said it had not but assured him that he would get it; that his house burned up on the 29th of that

month. While appellant gave a different version of their conversations and differed as to the time they were had, appellee was corroborated by two witnesses. The credibility of their testimony the court below was better able to determine than we, and we cannot say that its finding was manifestly against the weight of the evidence which tended to show a contract to procure the policy and damages sustained to the amount assessed.

On the question of damages the abstract shows no objection to the evidence as finally offered on that subject, which was to the effect that the house was worth about $2300, one thousand of which was covered by another policy held by the mortgagee of the property.

As to the premium, the payment of it was expressly waived by appellee. Its payment might be necessary to enforce the policy against the insurer but it was not necessary to the validity of an agreement with the agent to procure the policy. However, there was no proposition of law submitted on this or any other question.

We see nothing in the point of alleged negligence to procure a policy elsewhere. The evidence is to the effect that appellant induced appellee to believe that the policy had been sent for and had not arrived. Under such circumstances he might reasonably expect to receive it and receive notice from appellant when it arrived. A wait of four weeks with that expectation was not unreasonable. But no proposition of law was submitted on this subject. In the state of the record there is nothing before us for consideration except the sufficiency of the evidence to sustain the court's finding. The judgment will be affirmed.

AFFIRMED.

month. While appellant gave a different version of their conversations and differed as to the time they were had, appellee was corroborated by two witnesses. The credibility of their testimony the court below was better able to determine than we, and we cannot say that its finding was manifestly against the weight of the evidence which tended to show a contract to procure the policy and damages sustained to the amount assessed.

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As to the premium, the payment of it was expressly waived by appellee. Its payment might be necessary to enforce the policy against the insurer but it was not necessary to the validity of an agreement with the agent to procure the policy. However, there was no proposition of law submitted on this or any other question.

We see nothing in the point of alleged negligence to procure a policy elsewhere. The evidence is to the effect that appellant induced appellee to believe that the policy had been sent for and had not arrived. Under such circumstances he might reasonably expect to receive it and receive notice from appellant when it arrived. A wait of four weeks with that expectation was not unreasonable. But no proposition of law was submitted on this subject. In the state of the record there is nothing before us for consideration except the sufficiency of the evidence to sustain the court's finding. The judgment will be affirmed.

AFFIRMED.

279 - 23624

211 I.A. 263

IN RE ESTATE
CHARLES H. MULLIKEN,
DECEASED.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In the administration of the above estate the Continental & Commercial National Bank of Chicago was allowed its claim of $10,000 as a creditor of the estate, on March 12th, 1914. On April 13th, 1914, the appraisement bill fixing the widow's award at $2,500 was filed and approved, and she made her selection the following month. On December 3rd, 1915, twenty months later, said bank filed a petition under section 75 of the administration act, to set aside and vacate the order approving the widow's award, and on April 13th, 1916, after a hearing of the petition and answer, the Probate Court entered an order reducing the award from $2,500 to $2,000. The widow appealed to the Circuit Court and that court on a stipulation of facts which merely recited the proceedings had in the administration of the estate in the Probate Court entered a judgment of nihil capiat and for costs against appellant. From that judgment this appeal is taken.

The facts are very similar to those in the case of Hodson v. Hodson, 277 Ill. 137, where, reviewing a similar petition filed by a legatee fifteen months after the award, the court held that the petitioner, not having asked the aid of the court within a reasonable time, the petition should be dismissed.

[illegible] - 23824

IN RE: ESTATE
CHARLES A. MULLIKEN,
DECEASED.

ASHRAF YOUS
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE HARRIS
DELIVERED THE OPINION OF THE COURT.

In the administration of the above estate the Continental & Commercial National Bank of Chicago was allowed its claim of $10,000 as a creditor of the estate, on March 16th, 1914. On April 14th, 1914, the agreement bill fixing the widow's award at $2,500 was filed and approved, and she made her selection the following month. On [illegible] 30, 1917, twenty months later, said bank filed a petition under section 75 of the administration act, to set aside and revoke the order approving the widow's award. On [illegible] 16th, 1918, after a hearing of the petition and answer, the probate court entered an order reducing the award from $2,500 to $2,000. The widow appealed to the circuit court, which court on a stipulation of facts which merely recited the proceedings had in the administration of the estate in the probate court entered a judgment of nihil dicit and for costs against appellant. From the judgment this appeal is taken.

The case is a very similar one to the case of Jones v. Jones, 217 Ill. 170, where, reversing a similar petition filed by a creditor fifteen months after the award, the court held that the petitioner, not having given the aid of the court within a reasonable time, the petition should be dismissed.

The basis of the court's reasoning was that the will having been probated and the status of the legatee established, he was bound to take notice of the award and act within a reasonable time, the injury being as great to him at that time as it was when he filed his petition fifteen months afterwards. Here, too, the will had been probated and the status of the creditor, as such, established before the award was approved. The injury to a creditor as well as to a legatee would be as great then as afterwards, and his interest, we think, requires him to take notice of the award, (the statute not providing for a notice) and to act with reasonable promptness if he wishes to avail himself of the statutory right to have it reviewed. Following the Hodson case, we think the failure of said bank to seek a review of the award for twenty months calls for a dismissal of the petition."

We need not refer to the form of the judgment below, as in any event it must be reversed with directions to dismiss the petition.

REVERSED WITH DIRECTIONS.

The basis of the court's reasoning was that the will having been probated and the assets of the insolvent established, he was bound to take notice of the award and act within a reasonable time. The injury being direct to him at that time as it was when he filed his petition fifteen months afterwards. Here, too, the will had been probated and the status of the creditor, as such, established before the award was approved. The injury to a creditor as well as to a legatee would be as great then as now, and his interest, we think, requires him to take notice of the award, (the statute not providing for a notice) and to act with reasonable promptness if he wishes to avail himself of the statutory right to have it reviewed. Following the Hodson case, we think the failure of said court to grant a review of the award for twenty months calls for a dismissal of the petition."

We need not refer to the form of the judgment below, as in any event it must be reversed with directions to dismiss the petition.

REVERSED WITH DIRECTIONS.

321 - 23666

CHARLEY OS-KO-MON,
Appellee,

vs.

NEW YORK STAR CO., a corporation et al., On Appeal of
MARIE BEREZNIAK,
Appellant.

Appeal from
Municipal Court
of Chicago.

211 I.A. 264

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The New York Star Co. sued appellee and filed an affidavit on which an attachment writ was issued and served on a garnishee. The cause coming on for trial the plaintiff was nonsuited. The attachment bond being breached thereby, suit was brought thereon and this appeal is for a judgment for $25, being solely for legal advice and services rendered in relation to the attachment and not for defending the suit. In Damron v. Sweetser, Caldwell & Co., 16 Ill. App. 339, 344, it was held that the damages in such a case might include counsel fees for professional services rendered in relation to the attachment.

The only question raised here is whether the court was justified in finding from the undisputed evidence that the services rendered by his counsel in examining the attachment papers on file and giving advice pertaining thereto were worth the sum assessed. There being no other proof on the subject we are practically asked to find that they were worth nothing. Appellee certainly had the right to seek counsel on the matter, and the attachment not having been prosecuted, he presumably was put to unnecessary expense in seeking advice in a matter whereby he was temporarily deprived of the property attached.

The judgment will be affirmed.

AFFIRMED.

321 - 25666

CHARLEY GO-KO-MON,
Appellee,

vs.

NEW YORK STAR CO., a cor-
poration et al., On Appeal of
MARIN SARKESIAN,
Appellant.

Appeal from
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The New York Star Co. sued Guy Lee and filed an affidavit on which an attachment writ was issued and served on a garnishee. The cause coming on for trial the plaintiff was nonsuited. The attachment bond being breached thereby, suit was brought thereon and this appeal is for a judgment for $25, being solely for legal advice and services rendered in relation to the attachment and not for defending the suit. In Denton v. Sweetser, Caldwell & Co., 16 Ill. App. 588, 594, it was held that the damages in such a case might include counsel fees for professional services rendered in relation to the attachment.

The only question raised here is whether the court was justified in finding from the undisputed evidence that the services rendered by the counsel in examining the attachment papers on file and giving advice pertaining thereto were worth the sum awarded. There being no other proof on the subject we are practically asked to find that they were worth nothing. Appellee certainly had the right to seek counsel on the matter, and the attachment not having been prosecuted, he presumably was put to unnecessary expense in seeking advice in a matter whereby he was temporarily deprived of the property attached.

The judgment will be affirmed.

138 - 24057

ALEXANDER H. REVELL & COMPANY, a corporation, Appellant, vs. C. H. MORGAN GROCERY COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 235

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee herein has moved to dismiss the appeal, the record failing to show an order of court approving the bond. The trial judge undertook to approve it by writing his name thereon under the word "approved". That is not sufficient under the practice act to perfect an appeal, as we held in case No. 22915, Sheppard-Strassheim Co. v. Geo. Nickas et al., filed October 9th, 1917, (not yet reported). We held in that case that sections 92 and 93 of the practice act with relation to the approval of appeal bonds by an order of court or by the clerk when authorized by the court to approve them, applies, under the reasoning of Israelstam v. U. S. Casualty Co., 272 Ill. 161, to appeals from municipal courts as well as to other courts of record. The statute not having been followed the motion to dismiss will be allowed.

DISMISSED.

138 - 24057

ALEXANDER H. NEWELL & COMPANY, a corporation, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
C. H. MORGAN GROCERY COMPANY, a corporation, Appellee.	)	OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee herein has moved to dismiss the appeal, the record failing to show an order of court approving the bond. The trial judge undertook to approve it by writing his name thereon under the word "approved". That is not sufficient under the practice act to perfect an appeal, as we held in case No. 23918, Sheppard-Stressheim Co. v. Geo. Wickes et al., filed October 9th, 1917, (not yet reported). We held in that case that sections 92 and 93 of the practice act with relation to the approval of appeal bonds by an order of court or by the clerk when authorized by the court to approve them, applies, under the reasoning of Jorgelatem v. U. S. Casualty Co., 272 Ill. 161, to appeals from municipal courts as well as to other courts of record. The statute not having been followed the motion to dismiss will be allowed.

DISMISSED.

26 - 23105

211 I.A. 266

ARMIN W. BRAND et al., Defendants in Error, vs. JOHN H. RUETER et al., Plaintiffs in Error.	Error to Circuit Court, Cook County.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, defendants below, have prosecuted this writ of error from a decree entered in a proceeding to foreclose a certain trust deed. The identical questions presented here were passed upon by this court in a former appeal (Brand v. Rueter, 200 App. 42), in which the Supreme Court denied a writ of certiorari. We are bound by that decision but even if we were not we perceive no reason for receding from the conclusion there reached. Accordingly the decree will be affirmed.

AFFIRMED.

26 - 25108

ANNIE V. BRAND et al.,	Defendants in error,	Error to
vs.		Circuit Court,
JOHN H. BURTER et al.,	Plaintiffs in error.	Cook County.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, defendants below, have prosecuted this writ of error from a decree entered in a proceeding to foreclose a certain trust deed. The identical questions presented here were passed upon by this court in a former appeal (Brand v. Burter, 200 App. 62), in which the Supreme Court denied a writ of certiorari. We are bound by that decision but even if we were not we perceive no reason for recasting from the conclusion there reached. Accordingly the decree will be affirmed.

AFFIRMED.

211 - 23177

211 I.A. 267

PAUL K. BRIMIE,
Appellee,

vs.

BELDEN MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for $3200.00 recovered by Paul K. Brimie, hereinafter referred to as the plaintiff, against the Belden Manufacturing Company, hereinafter referred to as the defendant, in an action for personal injuries sustained while in its employ.

Defendant was engaged in the manufacture of insulated wire, and part of its equipment consisted of a certain rubber-heating-or mixing machine, which consisted of two horizontal cylinders, each about three feet long, sixteen inches in diameter and about three-eighths of an inch apart and was operated by power. When in motion, the top surfaces of these cylinders or rollers turned toward each other, and they were so adjusted as to revolve at different rates of speed, thereby causing friction, which in turn heated the rubber as it passed between them. The rubber was fed in pieces by hand from the top, between the two rollers, and until properly heated, the operator would reach in with his left hand at the bottom of the rollers and take the pieces of rubber out as they came through. This process was repeated until the entire mass of rubber became sticky, when it would adhere to one or the other of the rollers, after which the operator cut it off. Plain-

No. 25177

PAUL K. BRIMIE,
Appellee,

vs.

BRUNSWICK MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for $2200.00 recovered by Paul K. Brimie, hereinafter referred to as the plaintiff, against the Belden Manufacturing Company, hereinafter referred to as the defendant, in an action for personal injuries sustained while in its employ.

Defendant was engaged in the manufacture of insulated wire, and part of its equipment consisted of a certain rubber-heating-or mixing machine, which consisted of two horizontal cylinders, each about three feet long, sixteen inches in diameter and about three-eighths of an inch apart and was operated by power. When in motion, the top surfaces of these cylinders or rollers turned toward each other, and they were so adjusted as to revolve at different rates of speed, thereby causing friction, which in turn heated the rubber as it passed between them. The rubber was fed in pieces by hand from the top, between the two rollers, and until properly heated, the operator would reach in with his left hand at the bottom of the rollers and take the pieces of rubber out as they came through. This process was repeated until the entire mass of rubber became sticky, when it would adhere to one or the other of the rollers, after which the operator cut it off. Plain-

tiff's hand was drawn in between the rollers and injured while feeding this machine. At the time of the injury, plaintiff was inexperienced in this line of work, having been in the employ of the defendant for about two days prior to the injury.

This action was brought under sec. 3 of the Workmen's Compensation Act in force May 1, 1912 (par. 5451, J. & A.) which permitted an employe to maintain a civil action against the employer, provided the injury was caused by the intentional omission of the employer to comply with statutory safety regulations.

It is urged by defendant that the evidence fails to show an intentional violation of such statutory safety regulations. We find, however, that a special interrogatory was submitted to the jury on behalf of the defendant, upon which the jury found specially that the president of the defendant company, prior to the time plaintiff sustained his injuries, intentionally omitted to comply with the statutory safety regulations applicable to the machine upon which plaintiff was injured. No motion was made by defendant to set aside this special finding of fact, nor has any error been assigned thereon. In this state of the record defendant is conclusively bound by such finding. City of Aurora v. Rockabrand, 149 Ill. 399; Voigt v. Anglo. Am. Prov. Co., 202 Ill. 462.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

tiff's hand was drawn in between the rollers and injured while feeding this machine. At the time of the injury, plaintiff was inexperienced in this line of work, having been in the employ of the defendant for about two days prior to the injury.

This action was brought under sec. 5 of the Workmen's Compensation Act in force May 1, 1912 (per. Stat. 1. & A.) which permitted an employe to maintain a civil action against the employer, provided the injury was caused by the intentional omission of the employer to comply with statutory safety regulations.

It is urged by defendant that the evidence fails to show an intentional violation of such statutory safety regulations. We find, however, that a special interrogatory was submitted to the jury on behalf of the defendant, upon which the jury found specially that the president of the defendant company, prior to the time plaintiff sustained his injuries, intentionally refused to comply with the statutory safety regulations applicable to the machine upon which plaintiff was injured. No motion was made by defendant to set aside this special finding of fact, nor has an error been assigned thereon. In this state of the record defendant is conclusively bound by such finding. City of Moline v. Hockenbrand, 149 Ill. 396; Voigt v. Anglo. Am. Prov. Co., 202 Ill. 462.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

80 - 23411

211 I.A. 271

WALTER PASK,
Appellee,

vs.

THE LONDON & LANCASHIRE FIRE INSURANCE COMPANY, LIMITED,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $434.30 in favor of plaintiff (appellee) in an action on an automobile theft insurance policy issued by the defendant.

The policy in question insured plaintiff against loss or damage to his automobile, therein described, by theft, robbery or pilfering, by any person or persons other than those in the employ, service or household of the insured.

The evidence on behalf of plaintiff showed that plaintiff had a summer home in Elmhurst, Illinois; that during the winter 1914-1915 he lived in Chicago, leaving his summer home in charge of one Mayer, whose sole duty was to take care of the premises and to feed the live stock and poultry thereon; that on the morning of February 10, 1915, plaintiff and his wife went to Elmhurst to inspect the premises; that they noticed the horse in the barn bore evidence of having been driven and misused, whereupon they demanded an explanation from Mayer; that shortly thereafter plaintiff left the premises in charge of his wife, with directions to discharge Mayer, while plaintiff returned to the city to get another man to take Mayer's place; that

60 - 23411

WALTER PARK,
Appellee,

vs.

THE LONDON & LANCASHIRE FIRE INSURANCE COMPANY, LIMITED,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McCONNELL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $454.30 in favor of plaintiff (appellee) in an action on an automobile theft insurance policy issued by the defendant.

The policy in question insured plaintiff against loss or damage to his automobile, therein described, by theft, robbery or pilfering, by any person or persons other than those in the employ, service or household of the insured.

The evidence on behalf of plaintiff showed that plaintiff had a summer home in Glenwood, Illinois; that during the winter 1914-1915 he lived in Chicago, leaving his summer home in charge of one Meyer, whose sole duty was to take care of the premises [illegible] to feed the live stock and poultry thereon; that on the morning of February 10, 1915, plaintiff and his wife went to Glenwood to inspect the premises; that they noticed the horse in the barn bore evidence of having been driven and missed, whereupon they demanded an explanation from Meyer; that shortly thereafter plaintiff left the premises in charge of his [illegible], with directions to discharge Meyer, while plaintiff returned to the city to get another man to take Meyer's place; that

plaintiff's wife then tendered Mayer a check covering his wages in full, and ordered him to pack up his belongings and leave at once, which he did; that subsequently plaintiff telephoned her from Chicago that their daughter was seriously ill, whereupon plaintiff's wife locked the premises, including the garage, and after feeding the Horse, left for Chicago; that on the following morning when she returned to Elmhurst she found the garage door unlocked and the automobile gone; that at about three or four o'clock that afternoon Mayer returned their automobile in a battered condition, - extra tires and batteries missing, the radiator and front lamps and numerous other parts broken, and blankets soiled; that when he saw plaintiff's wife coming toward him he abandoned the car and fled; that late in the afternoon of the same day plaintiff returned with another man to care for the premises. It further appeared from the evidence that Mayer had been in plaintiff's employ about three months; that his duties did not include driving the automobile; that when plaintiff's wife ordered Mayer to leave, she forgot to demand the keys of him; that thereafter plaintiff called upon one Larson, through whom he had placed the insurance of his car with the defendant company, and informed him of the aforesaid occurrence; that Larson advised plaintiff to have the automobile towed to Chicago, which he did; that Larson then had an adjuster of the defendant company call to examine plaintiff's automobile; that at the latter's suggestion plaintiff had the car repaired.

The evidence on behalf of the defendant showed that Mayer had taken plaintiff's automobile from the garage; that he was seen driving it about the country in the vicinity of Elmhurst; that he caused it to collide with a barn, whereby

plaintiff's wife then tendered Meyer a check covering his wages in full, and ordered him to pack up his belongings and leave at once, which he did; that subsequently plaintiff telephoned her from Chicago that their daughter was seriously ill, whereupon plaintiff's wife locked the premises, including the garage, and after feeding the horse, left for Chicago; that on the following morning when she returned to Kimbarat she found the garage door unlocked and the automobile gone; that at about three or four o'clock that afternoon Meyer returned their automobile in a battered condition, - extra tires and batteries missing, the radiator and front lamps and numerous other parts broken, and blankets soiled; that when he saw plaintiff's wife coming toward him he abandoned the car and fled; that late in the afternoon of the same day plaintiff returned with another man to care for the premises. It further appears from the evidence that Meyer had been in plaintiff's employ about three months; that his duties did not include driving the automobile; that when plaintiff's wife ordered Meyer to leave, she forgot to demand the keys of him; that thereafter plaintiff called upon one Larson, through whom he had placed the insurance of his car with the defendant company, and informed him of the aforesaid occurrence; that Larson advised plaintiff to have the automobile towed to Chicago, which he did; that Larson then had an adjuster of the defendant company call to examine plaintiff's automobile; that at the latter's request plaintiff had the car repaired.

The evidence on behalf of the defendant showed that Meyer had taken plaintiff's automobile from the garage; that he was seen driving it about the country in the vicinity of Kimbarat; that he caused it to collide with a barn, thereby

the radiator and one of the fenders were broken, and that subsequently it ran into a ditch near the roadside.

It is contended by defendant, first, that there was no evidence of a felonious intent on the part of Mayer to steal the said automobile.

The undisputed evidence shows that Mayer's duties did not include operating plaintiff's automobile. However, after his discharge, Mayer unlocked the garage and put the batteries and other equipment on the car and drove it away, without the owner's knowledge or consent. What became of the equipment, such as the two extra tires, the batteries etc., cannot be determined except on the theory that Mayer disposed of them, as they were not on the car when it was returned. Mayer's acts are entirely consistent with the theory that he took plaintiff's automobile with a felonious intent, but owing to the accident which rendered the car unfit for further use, his plans were thwarted, whereupon he stripped the car of its equipment and returned it, taking flight when discovered by plaintiff's wife.

The next point urged is that Mayer, when he took plaintiff's automobile from the garage, was in the employ of the plaintiff, and that therefore defendant was not liable on the insurance policy. On this question the testimony offered on behalf of the plaintiff was undisputed. It showed that plaintiff's wife had discharged Mayer on the morning of February 10, 1915, prior to the time that he took plaintiff's automobile.

Other points have been raised by defendant, all of which we have considered but shall not discuss further than to say they are without merit. Accordingly the judgment will be affirmed.

AFFIRMED.

the radiator and one of the fenders were broken, and that subsequently it ran into a ditch near the roadside.

It is contended by defendant, first, that there was no evidence of a felonious intent on the part of Mayer to steal the said automobile.

The undisputed evidence shows that Mayer's duties did not include operating plaintiff's automobile. However, after his discharge, Mayer unlocked the garage and put the batteries and other equipment on the car and drove it away, without the owner's knowledge or consent. What became of the equipment, such as the two extra tires, the batteries etc., cannot be determined except on the theory that Mayer disposed of them, as they were not on the car when it was returned. Mayer's acts are entirely consistent with the theory that he took plaintiff's automobile with a felonious intent, but owing to the accident which removed the car unfit for further use, his plans were thwarted, whereupon he stripped the car of its equipment and returned it, taking flight when discovered by plaintiff's wife.

The next point urged is that Mayer, when he took plaintiff's automobile from the garage, was in the employ of the plaintiff, and that therefore defendant was not liable on the insurance policy. On this question the testimony offered on behalf of the plaintiff was undisputed. It showed that plaintiff's wife had discharged Mayer on the morning of February 10, 1915, prior to the time that he took plaintiff's automobile.

Other points have been raised by defendant, all of which we have considered but shall not discuss further than to say they are without merit. Accordingly the judgment will be affirmed.

131 - 23471

R. C. FOSTER,
Appellant,

vs.

EUGENIE GRAF,
Appellee.

211 I.A. 272

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment nil capiat, in an action to recover the proceeds of certain checks.

During the years 1913 and 1914 defendant operated a saloon near the Chicago stock yards. Plaintiff was engaged in business in the same neighborhood, in the purchase and sale of cattle, in the course of which he employed one Ryan, whose duties were of a general character; he kept the books, did the banking, bought and sold cattle, and accepted checks in payment thereof. It appears from the evidence that the said Ryan had authority to indorse all checks for deposit with a rubber stamp bearing the following inscription:

"Pay to the order of
Drovers Deposit National Bank.
R. C. FOSTER."

In the course of his transactions, while in the employ of plaintiff, the said Ryan indorsed plaintiff's name on numerous checks aggregating upwards of $3,000, and cashed them with defendant, appropriating the money to his own use. Upon the discovery of the defalcation, plaintiff caused Ryan to be indicted on the charge of forgery. It appeared from the evidence that prosecution on this charge was

121 - 3471

[illegible] v. d. Werken, Appellant,

vs.

[illegible] Oak, Appellee.

[illegible] PUBLIC [illegible] FRAUDS OF THE [illegible].

This is an appeal by plaintiff from a judgment nil capiat, in an action to recover the proceeds of certain checks.

During the years 1911 and 1912 defendant operated a saloon near the [illegible] street, [illegible] engaged in business in the same neighborhood, in the purchase and sale of cattle, in [illegible] of which [illegible] employed one Ryan, whose duties were of a general character; he kept the books, did the banking, [illegible] and [illegible], and accepted checks in payment thereof. It appears from the evidence that the [illegible] authority to indorse all checks for deposit with a rubber stamp bearing the following inscription:

"Pay to the order of
Drovers Deposit National Bank,
E. [illegible]."

In the course of his employment one, while in the [illegible] of plaintiff, [illegible] in [illegible] on numerous checks [illegible] [illegible], and [illegible] them with defendant, appropriating the money to his own use. Upon the discovery of the defalcation, [illegible] in [illegible] Ryan to be indicted on the charge of forgery. It appears from the evidence that [illegible] on this charge [illegible]

abandoned, but that Ryan was subsequently indicted and sentenced on a plea of guilty to the charge of embezzlement.

It is contended by plaintiff that the verdict is clearly and manifestly against the weight of the evidence. However, under the law of this State, where a cause of action is based upon a crime, the degree of proof applicable to a criminal prosecution, i. e. proof beyond a reasonable doubt, is required to sustain a verdict (McInturff v. Ins. Co. of N. A., 248 Ill. 92; Germania F. I. Co. v. Klewer, 129 Ill. 599; Stecher Brg. Co. v. Carr, 194 Ill. App. 32). The basis of plaintiff's claim against defendant was, that the indorsements on the checks cashed by the latter were forged, and it is conceded that proof of such crime by Ryan was indispensable to a recovery by plaintiff. Therefore, unless we can say from an examination of the evidence that plaintiff has proven the forgery charge beyond a reasonable doubt, the judgment must be affirmed.

Certain witnesses testified to admissions made by plaintiff, in which he was alleged to have stated that Ryan was authorized to indorse checks generally. This testimony finds corroboration in the circumstance that the prosecution on the forgery indictment was abandoned and that Ryan was subsequently sentenced on a plea of guilty to the charge of embezzlement, and in the opinion of the majority of this court raises at least a reasonable doubt as to the guilt of Ryan of the crime of forgery.

In this view of the case it becomes unnecessary to consider the other errors assigned by plaintiff. Accordingly the judgment will be affirmed.

AFFIRMED.

abandoned, but that Ryan was subsequently indicted and sentenced on a plea of guilty to the charge of embezzlement.

It is contended by plaintiff that the verdict is clearly and manifestly against the weight of the evidence. However, under the law of this State, where a cause of action is based upon a crime, the degree of proof applicable is a criminal prosecution, i. e. proof beyond a reasonable doubt, is required to sustain a verdict (Mainhardt v. Ins. Co. of N. A., 248 Ill. 98; Germania F. I. Co. v. Hoerr, 120 Ill. 599; Bloomer Bros. Co. v. Carr, 194 Ill. App. 32). The basis of plaintiff's claim against defendant was, that the indorsements on the checks cashed by the latter were forged, and it is conceded that proof of such crime by Ryan was indispensable to a recovery by plaintiff. Therefore, unless we can say from an examination of the evidence that plaintiff has proven the forgery on its beyond a reasonable doubt, the judgment must be affirmed.

Certain witnesses testified to admissions made by plaintiff, in which he was alleged to have stated that Ryan was authorized to indorse checks generally. His testimony finds corroboration in the circumstance that the prosecution on the forgery indictment was abandoned and that Ryan was subsequently sentenced on a plea of guilty to the charge of embezzlement, and raises at least a reasonable doubt as to the guilt of Ryan of the crime of forgery.

In this view of the case it becomes unnecessary to consider the other errors assigned by plaintiff. Accordingly the judgment will be affirmed.

AFFIRMED.

170 - 23513

IRENE M. POSVIC,
Defendant in Error,

vs.

A. C. HARFORD et al..

HERMAN RONNAU,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 273

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for $800 rendered against Herman Ronnau, plaintiff in error, as damages for breach of a contract forthe sale of certain real estate.

Plaintiff in error and his wife, with others, owned certain lots situated in the city of Chicago. The evidence shows that plaintiff in error instructed one Harford (who was also a defendant below), to negotiate a sale thereof, and that shortly thereafter a contract of sale was executed with the defendant in error. The said contract was executed by Harford as agent for plaintiff in error and the remaining owners in common of the said property, at an agreed price of $4,800.00. Without further detailing the facts, it is sufficient to say that the deal was not consummated because two of the owners in common of the said property refused to join in the conveyance.

Suit was originally brought against Harford and the owners in common of the said property, but subsequently defendant in error dismissed as to all defendants except plaintiff in error, against whom the court entered the judgment herein complained of.

The court found that plaintiff in error had

170 - 25313

IRENE M. LOSVIC, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
A. C. HARFORD et al.,	
HERMAN MOSKOWITZ, Plaintiff in Error.	

MR. JUSTICE MOSCOWITZ DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review a judgment for $800 rendered against Irene Losvic, plaintiff in error, as damages for breach of a contract for the sale of certain real estate.

Plaintiff in error and his wife, with others, owned certain lots situated in the city of Chicago. The evidence shows that plaintiff in error instructed one Harford (who was also a defendant below), to negotiate a sale thereof, and that shortly thereafter a contract of sale was executed with the defendant in error. The said contract was executed by Harford as agent for plaintiff in error and the remaining owners in common of the said property, at an agreed price of $4,800.00. Without further detailing the facts, it is sufficient to say that the trial was not commenced because two of the owners in common of the said property refused to join in the conveyance.

Suit was originally brought against Harford and the owners in common of the said property, but subsequently defendant in error dismissed as to all defendants except plaintiff in error, against whom the court entered the judgment herein complained of.

The court found that plaintiff in error had

ordered the said Harford to make the contract of sale with defendant in error in the name of all the owners in common, assuring Harford that he (plaintiff in error) would procure the necessary deeds of conveyance to complete the sale; that the remaining owners had not authorized the execution of the said contract of sale; and that the said Harford was not liable as agent. From an examination of the evidence we are of the opinion that such findings were amply warranted.

It is insisted by plaintiff in error that inasmuch as this was an action on a written contract and service was had on all the defendants, it was improper for the court to dismiss the said defendants from the suit and enter judgment against plaintiff in error alone. Sec. 39 of the Practice Act (Par. 8576, J. & A. R. S. of Ill.) provides that amendments may be made before judgment rendered, by discontinuing as to any joint defendant and changing the form of action. (Cogshall v. Beesley, 76 Ill. 445; Kaspar v. The People, 230 Ill. 342.) It appearing from the evidence that plaintiff in error undertook to make a contract on behalf of all the owners in common of the property in question without their consent, he thereby became liable for the damages sustained by defendant in error by reason of his inability to perform the contract.

It is also contended that the damages are excessive. On the trial below it was conceded that defendant in error had a purchaser with whom she had already contracted to sell and who was ready, able and willing to pay $5,400.00 for the said property. The measure of damages was therefore the difference between the contract price to defendant in error ($4,800.00) and the re-sale price ($5,400.00), or $600.00. If defendant in error will enter a remittitur for $200.00 within ten days

ordered the said Harford to make the contract of sale with defendant in error in the name of all the owners in common, assuring Harford that he (plaintiff in error) would procure the necessary deeds of conveyance to complete the sale; that the remaining owners had not authorized the execution of the said contract of sale; and that the said Harford was not liable as agent. From an examination of the evidence we are of the opinion that such findings were amply warranted.

It is insisted by plaintiff in error that inasmuch as this was an action on a written contract and service was had on all the defendants, it was improper for the court to dismiss the said defendants from the suit and enter judgment against plaintiff in error alone. Sec. 39 of the Practice Act (Par. 8576, 1. S. A. H. . . of III.) provides that amendments may be made before judgment rendered, by discontinuing as to any joint defendant and changing the form of action. (Copeland v. Beasley, 76 Ill. 448; Hagar v. The People, 220 Ill. 342.) It appearing from the evidence that plaintiff in error undertook to make a contract on behalf of all the owners in common of the property in question without their consent, he thereby became liable for the damages sustained by defendant in error by reason of his inability to perform the contract.

It is also contended that the damages are excessive. On the trial below it was conceded that defendant in error had a purchaser with whom she had already contracted to sell and who was ready, able and willing to pay $5,400.00 for the said property. The measure of damages was therefore the difference between the contr ct price to defendant in error ($4,800.00) and the re-sale price ($5,400.00), or $600.00. If defendant in error will enter a remittitur for $600.00 within ten days

from the date of filing this opinion, the judgment will be affirmed for $600.00, otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

from the date of filing this opinion, the judgment will be affirmed for $800.00, otherwise it will be reversed and the cause remanded.

AFFIRMED OR REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

205 - 23549

211 I.A. 278

EMPIRE SECURITY COMPANY, Appellant,

vs.

J. M. BERRY, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for the defendant, in an action on a written guaranty.

Plaintiff's statement of claim alleged that one Lyon, being indebted to the plaintiff in the sum of $2,000, procured an extension of time of payment of the said indebtedness, by inducing the defendant to guarantee in writing the payment of the note of the said Lyon; that the said note was not paid by Lyon at maturity, and that defendant refused to pay same. The guaranty in question was as follows:

"April 15, 1914.

"To whom it may concern:
For value received, I hereby agree that in the event that James A. Lyon does not retire at maturity (September 15, 1914) his note of $2,000 dated this day, secured by $7,000, par value of the stock in the Remick Pharmacal Company, I will retire the note at its face, provided the said stock is returned to me then on payment of the said $2,000.
(signed) J. M. BERRY."

The affidavit of defense denied that defendant had offered to guarantee any indebtedness of the said Lyon, and denied that defendant had signed the alleged guaranty hereinabove set forth.

The court found that although the defendant had not himself signed the aforesaid guaranty, he had caused and authorized his name to be affixed thereto, and that he knew the said guaranty was to be used by the said Lyon for the

205 - 25649

EMPIRE SECURITY COMPANY,
Appellant,

vs.

J. M. BERRY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for the defendant, in an action on a written guaranty.

Plaintiff's statement of claim alleged that one Lyon, being indebted to the plaintiff in the sum of $2,000, procured an extension of time of payment of the said indebtedness, by inducing the defendant to guarantee in writing the payment of the note of the said Lyon; that the said note was not paid by Lyon at maturity, and that defendant refused to pay same. The guaranty in question was as follows:

"April 15, 1914.

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For value received, I hereby agree that in the event that James A. Lyon does not retire at maturity (September 15, 1914) his note of $2,000 dated this day, secured by $7,000, par value of the stock in the Remick Pharmacal Company, I will retire the note at its face, provided the said stock is returned to me then on payment of the said $2,000.
(signed) J. M. BERRY."

The affidavit of defense denied that defendant had offered to guarantee any indebtedness of the said Lyon, and denied that defendant had signed the alleged guaranty hereinabove set forth.

The court found that although the defendant had not himself signed the aforesaid guaranty, he had caused and authorized his name to be affixed thereto, and that he knew the said guaranty was to be used by the said Lyon for the

purpose of inducing the plaintiff to accept the latter's note for $2,000 in settlement of his claim for $2,000 against the said Lyon. No cross error has been assigned on any of the foregoing, although the record shows that defendant excepted to the finding that defendant had caused and authorized the said guaranty to be executed in his name.

The ruling of the court on the propositions of law submitted showed that the court based its judgment upon the theory that defendant was entitled to notice by plaintiff of its acceptance of the said guaranty, before any liability could arise thereunder. We think the court erred in so holding.

It will be noted that the guaranty hereinabove quoted recited that if the said Lyon did not retire the said note at maturity, defendant would do so etc. The word "retire" is defined in the Century dictionary as follows: "To recover; redeem; regain by the payment of a sum of money; hence, specifically, to withdraw from circulation by taking up and paying; so, to retire the bonds of a railway company; to retire a bill." The agreement of defendant was therefore to pay the said note if the said Lyon did not pay it at maturity. It did not require plaintiff to exhaust his remedies against Lyon before liability would attach against the defendant. This was an absolute guaranty of the note in question. (20 Cyc. 1408, and numerous cases there cited.) And the fact that the guaranty contained the words "To whom it may concern," by way of preamble, is immaterial. The debt guaranteed was expressly referred to in the guaranty itself and hence the preamble, "To whom it may concern," was mere surplusage. Inasmuch as the guaranty was absolute, no notice of its acceptance was necessary to make it binding upon defendant.

purpose of inducing the plaintiff to accept the letter's note for $2,000 in settlement of his claim for $2,000 against the said Lyon. No cross error has been assigned on any of the foregoing, although the record shows that defendant excepted to the finding that defendant had caused and authorized the said guaranty to be executed in his name.

The ruling of the court on the propositions of law submitted showed that the court based its judgment upon the theory that defendant was entitled to notice by plaintiff of its acceptance of the said guaranty, before any liability could arise thereunder. We think the court erred in so holding.

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It is equally well settled that where a contract of guaranty is entered into contemporaneously with the principal agreement, no notice of acceptance to the guarantor is necessary.

Furthermore, the contract of guaranty acknowledged the receipt of a valuable consideration moving from the creditor to the guarantor. No notice of acceptance is necessary to make such an agreement binding. Sears v. Swift, 66 Ill. App. 496; Taylor v. Tolman, 47 Ill. App. 264; Furst etc. Mfg. Co. v. Black, 111 Ind. 308.

However, we are of the opinion that the evidence clearly shows that the defendant received notice of the acceptance of his contract of guaranty.

It is also vigorously contended that defendant neither signed nor authorized the execution of the said guaranty. The trial court, however, specially found that the defendant had authorized the execution thereof on his behalf, and from a careful examination of the evidence we are of the opinion that it clearly sustains such finding. Inasmuch as no cross error has been assigned on this special finding, defendant is bound thereby. Farrell v. Tunnel Co., 177 Ill. App. 425; Voight v. Anglo Am. Prov. Co., 202 Ill. 462.

Accordingly the judgment of the municipal court will be reversed and judgment entered here for plaintiff in the sum of $2,570.00, this being the amount of the Lyon note with interest thereon at the rate of seven per cent. from April 15, 1914, to the date of the filing of this opinion.

REVERSED AND JUDGMENT HERE.

It is equally well settled that where a contract of guaranty is entered into contemporaneously with the principal agreement, no notice of acceptance to the guarantor is necessary.

Furthermore, the contract of guaranty acknowledged the receipt of a valuable consideration moving from the creditor to the guarantor. No notice of acceptance is necessary to make such an agreement binding. Jones v. Swift, 68 Ill. App. 490; Taylor v. Tolman, 47 Ill. App. 264; First etc. Mfg. Co. v. Black, 111 Ind. 308.

However, we are of the opinion that the evidence clearly shows that the defendant received notice of the acceptance of his contract of guaranty.

It is also vigorously contended that defendant neither signed nor authorized the execution of the said guaranty. The trial court, however, specially found that the defendant had authorized the execution thereof on his behalf, and from a careful examination of the evidence we are of the opinion that it clearly sustains such finding. Inasmuch as no cross error has been assigned on this special finding, defendant is bound thereby. Burrell v. Tunnel Co., 177 Ill. App. 488; Volght v. Magic Ms. Prov. Co., 208 Ill. 482.

Accordingly the judgment of the municipal court will be reversed and judgment entered here for plaintiff in the sum of $2,870.00, this being the amount of the loan note with interest thereon at the rate of seven per cent. from April 15, 1914, to the date of the filing of this opinion.

REVERSED AND JUDGMENT HERE.

213 - 23557

EDWARD F. LYONS, doing business as Auto Tire Sales Company, Appellant, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 280

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment nil capiat, in an action brought on a burglary insurance policy, for the value of merchandise stolen from the premises occupied by plaintiff.

By the terms of the policy in question, the defendant agreed to indemnify the plaintiff against direct loss by burglary of merchandise described therein, contained in the store, warehouse, office, loft, or rooms actually occupied by the assured, located on the main floor of the building at Nos. 1346 and 1348 South Michigan Avenue, in the city of Chicago.

The merchandise for which recovery was sought, was contained in a shed located in the rear of the premises known as No. 1350 South Michigan Avenue, which is immediately south of plaintiff's store, but there is no physical connection between them.

It is insisted by plaintiff that it was the intention of the parties that the burglary policy in question, covering the store at Nos. 1346 and 1348 South Michigan Avenue should also cover the shed in question.

It is admitted that prior to the loss, plaintiff had a conversation with the agent of the defendant, concerning insurance on the merchandise contained in the shed. The

EDWARD F. LYONS, doing business as Auto Tire Sales Company,
Appellant,

vs.

UNITED STATES INDEMNITY & GUARANTY COMPANY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment nil capiat, in an action brought on a burglary insurance policy, for the value of merchandise stolen from the premises occupied by plaintiff.

By the terms of the policy in question, the defendant agreed to indemnify the plaintiff against direct loss by burglary of merchandise described therein, contained in the store, warehouse, office, loft, or rooms actually occupied by the insured, located on the main floor of the building at Nos. 1246 and 1248 South Michigan Avenue, in the city of Chicago.

The merchandise for which recovery was sought, was contained in a shed located in the rear of the premises known as No. 1250 South Michigan Avenue, which is immediately south of plaintiff's store, but there is no physical connection between them.

It is insisted by plaintiff that it was the intention of the parties to the burglary policy in question, covering the store at Nos. 1246 and 1248 South Michigan Avenue should also cover the shed in question.

It is admitted that prior to the loss, plaintiff had a conversation with the agent of the defendant, concerning insurance on the merchandise contained in the shed. The

former testified that the conversation related to burglary insurance, while defendant's agent testified that it referred to fire insurance only. After this conversation, defendant's agent, who also represented the fire insurance company that had issued certain fire insurance policies on the merchandise in the store in question, found upon investigation that the shed hereinabove referred to should have been described as being in the rear of Nos. 64 to 72 east 14th street, and that he thereupon caused the fire insurance policies to be changed so as to cover the merchandise contained in the shed as well. Had it been the intention of the parties to have the burglary insurance policy on the merchandise in the store cover the merchandise contained in the shed, it is reasonable to infer that the necessary change would have been made in the burglary policy as was done with the fire insurance policies, and that the necessity for such a change in the burglary policy must have been apparent to the plaintiff.

From a careful examination of the record, we are of the opinion that the trial court properly found that the merchandise contained in the shed in question was not intended to be, and was not included in the burglary insurance policy referred to. The risk in this case was expressly taken on the merchandise etc. contained on the main floor of the building at Nos. 1346 and 1348 South Michigan Avenue, and it cannot be extended so as to make it cover merchandise contained in the shed, to which no reference was made in the policy. Liebenstein v. Baltic Ins. Co., 45 Ill. 301.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

former testified that the conversation related to burglary insurance, while defendant's agent testified that it referred to fire insurance only. After this conversation, defendant's agent, who also represented the fire insurance company that had issued certain fire insurance policies on the merchandise in the store in question, found upon investigation that the shed hereinabove referred to should have been described as being in the rear of Nos. 64 to 72 West 14th street, and that no thereupon caused the fire insurance policies to be changed so as to cover the merchandise contained in the shed in question. Had it been the intention of the parties to have the burglary insurance policy on the merchandise in the store cover the merchandise contained in the shed, it is reasonable to infer that the necessary change would have been made in the burglary policy as was done with the fire insurance policies, and that the necessary for such a change in the burglary policy must have been apparent to the plaintiff.

From a careful examination of the record, we are of the opinion that the trial court erroneously found that the merchandise contained in the shed in question was not intended to be, and was not included in the burglary insurance policy referred to. The risk in this case was expressly taken on the merchandise etc. contained on the main floor of the building at Nos. 1368 and 1366 South Michigan Avenue, and it cannot be extended so as to make it cover merchandise contained in the shed, to which no mention was made in the policy. Independent v. Phoenix Ins. Co., 51 Ill. App. 1.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

225 - 23570

211 I.A. 281

EARLINE DURRELL,
Plaintiff in Error,

vs.

ROBERT T. DURRELL,
Defendant in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error, plaintiff in error seeks a reversal of a decree of court dismissing for want of equity her petition for restoration of a decree for alimony.

On March 31, 1904, plaintiff in error obtained from defendant in error a decree of divorce which provided for an allowance to her of $25.00 per month as alimony. On February 2, 1907, upon a hearing the court found plaintiff in error guilty of leading a life of prostitution and ordered that payment of alimony be discontinued after the month of January, 1907. On December 5, 1907, on a rule to show cause why defendant in error should not be punished for contempt of court for failing to pay alimony, the court found the sum of $50.00 due, - presumably for alimony accruing prior to February 1, 1907 - and entered an order reciting the payment thereof to the plaintiff in error in open court, and her acceptance thereof in full of all claims and demands against defendant in error, arising out of the said decree for alimony. Said order also contained the following recital:

> "Now, therefore, by the consent of all the parties hereto, it is ordered, adjudged and decreed that the said Robert T. Durrell be and he is hereby discharged and released from and against any and all manner of claims which the said Earline Durrell has or might have against him by reason of any order or decree of this court heretofore entered herein, or by reason of any other matter or thing whatsoever.
>
> "It is further ordered that this cause be dismissed and that no further proceedings be had herein.
>
> CARPENTER, Judge.

MARLENE BURRELL, Plaintiff in Error,	
vs.	ERROR TO
ROBERT T. BURRELL, Defendant in Error.	CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

By this writ of error, plaintiff in error seeks a reversal of a decree of court dismissing for want of equity her petition for restoration of a decree for alimony.

On March 21, 1901, plaintiff in error obtained from defendant in error a decree of divorce which provided for an allowance to her of $25.00 per month as alimony. On February 2, 1907, upon a hearing the court found plaintiff in error guilty of leading a life of prostitution and ordered that payment of alimony be discontinued after the month of January, 1907. On December 3, 1907, on a rule to show cause why defendant in error should not be punished for contempt of court for failing to pay alimony, the court found the sum of $50.00 due, - presumably for alimony accruing prior to February 1, 1907 - and entered an order requiring the payment thereof to the plaintiff in error in one year, and her acceptance thereof in full of all claims and demands against defendant in error, arising out of the said decree for alimony. Said order also contained the following recital:

> "Now, therefore, by the consent of all the parties hereto, it is ordered, adjudged and decreed that the said Robert T. Burrell be and he is hereby discharged and released from and against any and all manner of claims which the said Marlene Burrell has or might have against him by reason of any order or decree of this court heretofore entered herein, or by reason of any other matter or thing whatsoever.
>
> "It is further ordered that this cause be dismissed and that no further proceedings be had herein.

"The above order is satisfactory to me and I request the court to enter the same.

EARLINE DURRELL.

"O. K.:

Blum & Blum,
Solicitors for Earline Durrell."

It is insisted by plaintiff in error that the orders of February 2, 1907 and December 5, 1907 were void, for the alleged reason that at the time of their entry the court had lost jurisdiction of the subject matter and that hence her petition seeking restoration of alimony was erroneously dismissed.

The power of a court to change its decree requiring payment of alimony out of the future earnings of the husband is sustained in the case of Cole v. Cole, 142 Ill. 19, in which the court said, p. 29:

> * * * "and it might be, under these circumstances, unconscionable to compel the husband, by his daily labor, to support his divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would seem to justify the court, in such a case, in the exercise of its general chancery powers, to modify or revoke its former order."

Furthermore, plaintiff in error, by the order of December 5, 1907, which recited that it was entered with her consent and at her request, is now precluded from questioning the validity thereof. It follows, therefore, that the court properly dismissed the petition in question for want of equity. Accordingly the decree will be affirmed.

AFFIRMED.

"The above order is satisfactory to me and I request the court to enter the same.
MARLINE BURNELL.

"O. K.:
Blum & Blum,
Solicitors for Marline Burnell."

It is insisted by plaintiff in error that the orders of February 2, 1907 and December 5, 1907 were void, for the alleged reason that at the time of their entry the court had lost jurisdiction of the subject matter and that hence her petition seeking restoration of alimony was erroneously dismissed.

The power of a court to change its decree requiring payment of alimony out of the future earnings of the husband is sustained in the case of Dole v. Dole, 140 Ill. 19, in which the court said, p. 20:

> " " " and it might be, under these circumstances, uncomfortable to compel the husband, by his daily labor, to support his divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would be in to justify the court, in such a case, in the exercise of its general chancery powers, to modify or revoke its former order."

Furthermore, plaintiff in error, by the order of December 5, 1907, which recites that it was entered with her consent and at her request, is now precluded from questioning the validity thereof. It follows, therefore, that the court properly dismissed the petition in question for want of equity. Accordingly the decree will be affirmed.

AFFIRMED.

233 - 23578

JOHN V. ZELEZNY, Administrator of the estate of Frank Brehovsky, deceased, Appellant, vs. BIRK BROTHERS BREWING COMPANY, a corporation, and EMANUEL F. NAPIERALSKI, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

211 I.A. 282

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant brought this action as administrator of the estate of Frank Brehovsky, deceased, to recover damages from defendants for negligently causing his death. At the close of plaintiff's case, each defendant made a motion for a directed verdict, both of which said motions were denied by the court. At the close of all the evidence similar motions were made by both defendants for directed verdicts in their favor, which the court also denied. During the argument to the jury, the court intervened and on its own motion directed a verdict in favor of both defendants, and from the judgment rendered thereon plaintiff has prosecuted this appeal.

The accident occurred in the neighborhood of Paulina street and Eighteenth place, in the city of Chicago. Paulina street runs north and south and is intersected at right angles by Eighteenth place, which runs east and west. Funeral services were being held at a church situated at the northwest corner of said intersection. Plaintiff's intestate was in charge of the hearse, which was backed against the west curb of Paulina street, just north of Eighteenth place. The horses attached thereto stood at right angles to the hearse and

233 - 25578.

JOHN V. KENNEDY, Administrator of the estate of Frank Krenovsky, deceased, Appellant,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
BIRK BROTHERS BREWING COMPANY, a corporation, and EMANUEL F. MARKERAUKI, Appellees.	

MR. JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

Appellant brought this action as administrator of the estate of Frank Krenovsky, deceased, to recover damages from defendants for negligently causing his death. At the close of plaintiff's case, each defendant made a motion for a directed verdict, both of which said motions were denied by the court. At the close of all the evidence similar motions were made by both defendants for directed verdicts in their favor, which the court also denied. During the argument to the jury, the court intervened and on its own motion directed a verdict in favor of both defendants, and from the judgment rendered thereon plaintiff has prosecuted this appeal.

The accident occurred in the neighborhood of Paulina street and Eighteenth place, in the city of Chicago. Paulina street runs north and south and is intersected at right angles by Eighteenth place, which runs east and west. Funeral services were being held at a church situated at the northwest corner of said intersection. Plaintiff's intestate was in charge of the hearse, which was backed against the west curb of Paulina street, just north of Eighteenth place. The horses attached thereto stood at right angles to the hearse and

faced south. Paulina street at this particular place is 38 feet wide from curb to curb, and the evidence shows that carriages were lined up on both sides of the street.

The defendant brewing company's motor truck was moving north on the east side of Paulina street. At it approached Eighteenth place, the horses attached to the hearse became restless and showed signs of fright, whereupon plaintiff's intestate raised his hand to indicate this fact to the driver of the said truck, after which the trunk proceeded a short distance across Eighteenth place and came to a full stop at the northeast corner of the said intersection. At about this time defendant Napieralski's automobile, which was moving south on Paulina street, approached the hearse, and stopped just opposite the horses. Thereupon the horses reared, backed the hearse up on the curb, ran south on Paulina street, and collided with a carriage, which caused the hearse to upset, throwing plaintiff's intestate to the ground, whereby he sustained injuries which a short time later proved fatal.

The declaration contained several charges of negligence against both defendants in the operation of their respective motor vehicles. The fourth count alleged that defendants carelessly and negligently drove their vehicles nearer the said hearse and team than was necessary and so close thereto that the team attached to the said hearse became frightened and ran away.

On behalf of the plaintiff, the witness Mrazek testified that defendant Napieralski's automobile came in front of the team, scraping the tip of the pole to which the horses were attached. His testimony on this point was as follows:

faced south. Fauldna street at this particular place is 38 feet wide from curb to curb, and the evidence shows that carriages were lined up on both sides of the street.

The defendant brewing company's motor truck was moving north on the east side of Fauldna street. At it approached Eighteenth place, the horses attached to the hearse became restless and showed signs of fright, whereupon plaintiff's intestate raised his hand to indicate this fact to the driver of the said truck, after a ion the truck proceeded a short distance across Eighteenth place and came to a full stop at the northeast corner of the said intersection. At about this time defendant Kopczelski's automobile, which was moving south on Fauldna street, approached the hearse, and stopped just opposite the horses. Thereupon the horses reared, backed the hearse up on the curb, ran south on Fauldna street, and collided with a carriage, which caused the hearse to upset, throwing plaintiff's intestate to the ground, whereby he sustained injuries which a short time later proved fatal.

The declaration contained several charges of negligence against both defendants in the operation of their respective motor vehicles. The fourth count alleged that defendants carelessly and negligently drove their vehicles nearer the said hearse and team than was necessary and so close thereto that the team attached to the said hearse became frightened and ran away.

On behalf of the plaintiff, the witness Krasek testified that defendant Kopczelski's automobile came in front of the team, scraping the tip of the pole to which the horses were attached. His testimony on this point was as follows:

> "He came all the way to the front of the team, came in front of the hearse team, scraping the tip of the pole of the hearse. When he done that, the horses swung west as far as the curb, backing up the hind part of the hearse on the sidewalk as far as the front wheels touched the curb, then breaking the pole." * * *

There was also testimony as to the speed at which both motor vehicles were proceeding just prior to the accident, the consensus of which was that they were both moving slowly.

It is contended by plaintiff that the court erred in directing a verdict for defendants.

The rule is that where a motion to direct a verdict for the defendant is presented to the court, the evidence most favorable to the plaintiff must be considered as true, with all reasonable inferences that can be drawn therefrom; and if from such evidence, standing alone, it can be reasonably said or inferred that it proves the material averments of the declaration, a verdict for the defendant should not be directed. (Devine v. Delano, 272 Ill. 166.) In the case at bar there was evidence which, standing alone, would tend to show that defendant Napieralski's automobile was driven so close to the horses as to scrape the end of the pole to which they were attached. From such evidence, standing alone, we think the question whether the horses became frightened because of the close proximity of defendant Napieralski's automobile to them was one of fact for the determination of the jury, and the court erred in directing a verdict for said defendant.

Cross error has been assigned upon the ruling of the court in denying the defendant brewing company's motion for a directed verdict in its favor at the close of plaintiff's case.

Defendant brewing company having elected to

> "He came all the way to the front of the team, came in front of the horses team, scrapping the tip of the pole of the horses. When he done that, the horses swung west as far as the curb, backing up the hind part of the horses on the sidewalk as far as the front wheels touched the curb, then breaking the pole." * * *

There was also testimony as to the speed at which both motor vehicles were proceeding just prior to the accident, the consensus of which was that they were not moving slowly.

It is contended by plaintiff that the court erred in directing a verdict for defendants.

The rule is that where a motion to direct a verdict for the defendant is presented to the court, the evidence most favorable to the plaintiff must be considered as true, with all reasonable inferences that may be drawn therefrom; and if from such evidence, standing alone, it can be reasonably said or inferred that it proves the mat rial averments of the declaration, a verdict for the defendant should not be directed. (Devine v. Delano, 272 Ill. 187.) In the case at bar there was evidence which, standing alone, would tend to show that defendant Vaplersiakis's automobile was driven so close to the horses as to scrape the end of the pole to which they were attached. From such evidence, standing alone, we think the question whether the horses became frightened because of the close proximity of defendant Vaplersiakis's automobile to them was one of fact for the determination of the jury, and the court erred in directing a verdict for said defendant.

Cross error has been assigned upon the ruling of the court in denying the defendant Brewing company's motion for a directed verdict in its favor at the close of plaintiff's case.

Defendant brewing company having elected to

stand by its motion for a directed verdict made at the close of plaintiff's case, its rights thereunder must be determined as of the time when the motion was made, notwithstanding the defendant Napieralski subsequently introduced evidence on his own behalf. (Condon v. Schoenfeld, 214 Ill. 226.) In our opinion, there was no evidence in the record at the close of plaintiff's case which, standing alone, would warrant the inference that the defendant brewing company was guilty of any negligence which caused or contributed to cause the injury in question, and hence the court erred in denying its said motion. However, under the rule in this State, a judgment in favor of joint defendants is a unit, and a reversal as to one requires a reversal as to all. McDonald v. Wilkie, 13 Ill. 22; Seymour v. Richardson Fueling Co., 205 Ill. 77.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

stand by its motion for a directed verdict made at the close of plaintiff's case, its rights thereunder must be determined as of the time when the motion was made, notwithstanding the defendant Kapkersleki subsequently introduced evidence on his own behalf. (Gordon v. Schoenfield, 214 Ill. 226.) In our opinion, there was no evidence in the record at the close of plaintiff's case which, standing alone, would warrant the inference that the defendant brewing company was guilty of any negligence which caused or contributed to cause the injury in question, and hence the court erred in denying its said motion. However, under the rule in this State, a judgment in favor of joint defendants is a unit, and a reversal as to one requires a reversal as to all. McDonald v. Wilkie, 15 Ill. 20; Seymour v. Richardson Heating Co., 205 Ill. 77.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

246 - 23591

211 I.A. 284

ROBERT SCHRAYER, doing business as M. SCHRAYER'S SONS & COMPANY,
Appellee,

vs.

C. DOERING & SON, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a judgment for $250.23 entered by default after defendant's affidavit of defense had been stricken from the files, the court holding that it failed to state any legal grounds of defense to plaintiff's action.

Plaintiff's statement of claim alleged that defendant was indebted to him in the sum aforesaid, for goods, wares and merchandise delivered as per itemized statement attached. Under the so-called simplified form of pleadings in the municipal court, plaintiff was also permitted to file a written contract entered into between the parties hereto, bearing the notation, "instrument sued on," which purported to cover the merchandise mentioned in plaintiff's statement of claim, but which also contained a provision requiring the plaintiff to deliver a much larger quantity of merchandise within the time and at the price therein mentioned. An inspection of the itemized statement of claim and a comparison with the contract sued on disclose that shipments were not made within the time nor in the amounts provided for by the said contract.

246 - 23591

ROBERT SCHRAYER, doing business as M. SCHRAYER'S SONS & COMPANY,
Appellee,

vs.

C. DOERING & SON, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, from a judgment for $250.25 entered by default after defendant's affidavit of defense had been stricken from the files, the court holding that it failed to state any legal grounds of defense to plaintiff's action.

Plaintiff's statement of claim alleged that defendant was indebted to him in the sum aforesaid, for goods, wares and merchandise delivered as per itemized statement attached. Under the so-called simplified form of pleadings in the municipal court, plaintiff was also permitted to file a written contract entered into between the parties hereto, bearing the notation, "instrument sued on," which purported to cover the merchandise mentioned in plaintiff's statement of claim, but which also contained a provision requiring the plaintiff to deliver a much larger quantity of merchandise within the time and at the price therein mentioned. An inspection of the itemized statement of claim and a comparison with the contract sued on discloses that shipments were not made within the time nor in the amounts provided for by the said contract.

Defendant's affidavit of defense stated in substance that certain items mentioned in plaintiff's statement of claim were samples furnished gratis to the defendant and that owing to an advance in the price of the merchandise mentioned in the contract sued on, plaintiff failed to make delivery thereof as by said contract provided, and that by reason of plaintiff's said breach of contract the defendant was obliged to purchase said merchandise elsewhere at an advance over the contract price; that by reason thereof defendant sustained damages in an amount in excess of plaintiff's claim for the merchandise delivered; that at the times when payment by defendant became due according to the terms of the said agreement for the merchandise delivered, defendant offered the plaintiff to set off against the amounts due for such merchandise, damages therein sustained by reason of plaintiff's nondelivery of merchandise as aforesaid.

Clearly, this affidavit stated a good defense as to the amount of merchandise claimed to have been delivered gratis as samples. If the affidavit set forth a legal defense as to any part of plaintiff's claim, it was error for the court to strike it from the files. (American Hard Rubber Co. v. Howe, 280 Ill. 431.) Defendant alleged in its affidavit of defense that plaintiff had defaulted in the performance of his contract, as a result of which it sustained damages in excess of the value of the merchandise actually delivered, and offered to set off such damages (which appeared to be liquidated) against the installments due. This in our opinion stated a good defense to plaintiff's claim. (Bradley v. King, 44 Ill. 339; Harber Bros. Co. v. Moffat Cycle Co., 151 Ill. 84.) It follows, therefore, that the court erred in striking the said affidavit

Defendant's affidavit of defense stated in substance that certain items mentioned in plaintiff's statement of claim were samples furnished gratis to the defendant and that owing to an advance in the price of the merchandise mentioned in the contract sued on, plaintiff failed to make delivery thereof as by said contract provided, and that by reason of plaintiff's said breach of contract the defendant was obliged to purchase said merchandise elsewhere at an advance over the contract price; that by reason thereof defendant sustained damages in an amount in excess of plaintiff's claim for the merchandise delivered; that at the times when payment by defendant became due according to the terms of the said agreement for the merchandise delivered, defendant offered the plaintiff to set off against the amounts due for such merchandise, damages thereon sustained by reason of plaintiff's nondelivery of merchandise as aforesaid.

Clearly, this affidavit stated a good defense as to the amount of merchandise claimed to have been delivered gratis as samples. If the affidavit set forth a legal defense as to any part of plaintiff's claim, it was error for the court to strike it from the files. (American Hard Rubber Co. v. Howe, 280 Ill. 431.) Defendant alleged in its affidavit of defense that plaintiff had defaulted in the performance of his contract, as a result of which it sustained damages in excess of the value of the merchandise actually delivered, and offered to set off such damages (which appeared to be liquidated) against the installments due. This in our opinion stated a good defense to plaintiff's claim. (Brooley v. King, 44 Ill. 339; Harper Bros. Co. v. Moffat Cycle Co., 181 Ill. 84.) It follows, therefore, that the court erred in striking the said affidavit

of defense from the files and in entering a default judgment against defendant. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

of defense from the files and in entering a default judgment against defendant. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

44 - 23357

211 I.A. 294

JOHN F. DEVINE, Administrator of the estate of Rudolph Kramp, deceased, Defendant in Error, vs. MANDO RAMMESATHI, Plaintiff in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below as administrator sued under the statute for alleged negligence causing the death of his intestate, a boy about five years of age who left him surviving father and mother, and brothers and sisters.

The declaration alleged and the proof showed that a servant of the defendant while working for the defendant within the scope of his employment, left a team of horses attached to a wagon standing unfastened and unguarded in a public street in the city of Chicago contrary to the provisions of an ordinance of the city; that the team ran into a sidewalk upon which deceased was playing, causing injuries which resulted in his death.

A jury found the defendant guilty and assessed plaintiff's damages at the sum of $3000 on which verdict a judgment was entered.

We have examined all the reasons urged by appellant as ground for reversal and are of the opinion that they are without merit.

The judgment is not excessive. The proof showed beyond doubt that the servant of defendant was negligent and that the death of the deceased resulted from injuries sustained by reason thereof. There was no proof from which

JOHN F. DEVINE, administrator of the estate of Rudolph Kraus, deceased,
Defendant in Error,

vs.

MANDO RAMSCHATHI,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below as administrator sued under the statute for illegal negligence causing the death of his intestate, a boy about five years of age who left him surviving father and mother, and brothers and sisters.

The declaration alleged and the proof showed that a servant of the defendant while working for the defendant within the scope of his employment, left a team of horses attached to a wagon standing unfastened and unguarded in a public street in the city of Chicago contrary to the provisions of an ordinance of the city; that the team ran into a sidewalk upon which deceased was playing, causing injuries which resulted in his death.

A jury found the defendant guilty and assessed plaintiff's damages at $[illegible] upon which verdict a judgment was entered.

We have examined all the reasons urged by appellant as grounds for reversal and are of the opinion that they are without merit.

The judgment is not excessive. The proof showed beyond doubt that the servant of defendant was negligent and that the death of the deceased resulted from injuries sus-

contributory negligence on the part of the parents could be inferred.

Complaint is made that the court denied defendant's motion for leave to withdraw a juror. Defendant claimed surprise by reason of the death of a stenographer who had taken the testimony of one of plaintiff's witnesses as given at the coroner's inquest. Defendant wished by the stenographer's notes to impeach the testimony of this witness. It was made to appear, however, that the testimony of plaintiff's witness as given at the inquest might have been obtained from the official record of the coroner. That would have been the best evidence.

We think, therefore, there was no error in denying defendant's motion. (Overtoom v. C. & E. I. R. R. Co., 181 Ill. 323. The judgment of the Circuit Court will be affirmed.

AFFIRMED.

contributory negligence on the part of the parents could be inferred.

Complaint is made that the court denied defendant's motion for leave to withdraw a juror. Defendant claimed surprise by reason of the death of a stenographer who had taken the testimony of one of plaintiff's witnesses as given at the coroner's inquest. Defendant wished by the stenographer's notes to impeach the testimony of this witness. It was made to appear, however, that the testimony of plaintiff's witness as given at the inquest might not have been obtained from the official record of the coroner. That would have been the best evidence.

We think, therefore, there was no error in denying defendant's motion. (Everson v. C. & N. I. R. R. Co., 141 Ill. 283. The judgment of the Circuit Court will be affirmed.

AFFIRMED.

62 - 23382

211 I.A. 296

THORDORSON ELECTRIC MANUFACTURING COMPANY, a corporation,
Appellant,

vs.

HUB ELECTRIC COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant who was plaintiff below, sued appellee for the price of five hundred 3 way ringers furnished by plaintiff to defendant September 8th, 1916, at the agreed price of $375.00.

The affidavit of merits denied any indebtedness and set up that the goods were ordered from the Inland Electric Company, "the agent of the plaintiff"; that they were defective and faulty and that said Inland Electric Company was notified and took back the said goods and no other goods had been delivered in place thereof.

The evidence for plaintiff proved a contract in writing between plaintiff and defendant dated April 27th, 1916, whereby it ordered 1,000 three way transformers at 75 cents each to be taken in twenty months from date "as ordered by us".

After the making of this contract, plaintiff's manager called up defendant and asked if the first 100 transformers under the contract might be billed through the Inland Electric Company, a jobber in electrical supplies with whom plaintiff had a contract which gave the Inland Electric Company the exclusive agency of the sale of these

THORNBORGH ELECTRIC MANUFACTURING COMPANY, a corporation, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT
	OF CHICAGO.
MIR ELECTRIC COMPANY, a corporation, Appellee.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant who was plaintiff below, sued appellee for the price of five hundred 3 way ringers furnished by plaintiff to defendant September 8th, 1916, at the agreed price of $275.00.

The affidavit of merits denied any indebtedness and set up that the goods were ordered from the Inland Electric Company, "the agent of the plaintiff"; that they were defective and faulty and that said Inland Electric Company was notified and took back the said goods and no other goods had been delivered in place thereof.

The evidence for plaintiff proved a contract in writing between plaintiff and defendant dated April 27th, 1916, whereby it ordered 1,000 three way transformers at 75 cents each to be taken in twenty months from date "as ordered by us".

After the making of this contract, plaintiff's manager called up defendant and asked if the first 100 transformers under the contract might be billed through the Inland Electric Company, a jobber in electrical supplies with whom plaintiff had a contract that gave the Inland Electric Company the exclusive agency of the sale of these

goods. The defendant consented and the first 100 transformers were billed to defendant through the Inland Electric Company and the defendant made payment for the goods to it.

On September 7th, 1916, the Inland Electric Company at the request of the defendant made a requisition on the plaintiff to ship defendant 500 transformers. There had been some dissatisfaction expressed by both parties to the contract between the Inland Electric Company and the plaintiff, and upon receipt of this requisition, plaintiff called up the defendant and asked if the goods might be sent and billed to it direct, and receiving an affirmative reply, plaintiff so billed and delivered the goods. Defendant's receiving clerk receipted for the goods as follows:

"Original Chicago 9/8/16.

Received in good order of Thordarson Electric Mfg. Co., 501-515 South Jefferson Street,

To Hub Electric Co.,
1819 Carroll Ave.,

Customer's No. A 9152

No. of packages.

10 boxes Articles

500 - 3 Way Transformers

James Brown."

The evidence of defendant shows that after the receipt of these goods, defendant made a claim to the Inland Electric Company that they were defective and after some negotiations the Inland Electric Company without consulting plaintiff agreed to an allowance of 7 cents a piece upon each instrument because thereof.

The alleged defects were remedied by defendant, the Inland Electric Company, furnishing wire for that pur-

goods. The defendant consented and the first 100 transformers were billed to defendant through the Inland Electric Company and the defendant made payment for the goods to it.

On September 7th, 1916, the Inland Electric Company at the request of the defendant made a requisition on the plaintiff to ship defendant 500 transformers. There had been some dissatisfaction expressed by both parties to the contract between the Inland Electric Company and the plaintiff, and upon receipt of this requisition, plaintiff called up the defendant and asked if the goods might be sent and billed to it direct, and receiving an affirmative reply, plaintiff so billed and delivered the goods. Defendant's receiving clerk receipted for the goods as follows:

"Original Chicago 9\8\16.

Received in good order of Thorderson Electric Mfg. Co., 501-513 South Jefferson Street,

To Hub Electric Co.,
1819 Carroll Ave.,

Checker's No. A 9138

No. of packages.

10 boxes Articles

500 - 3 Way Transformers

Damen Prem."

The evidence of defendant shows that after the receipt of these goods, defendant made a claim to the Inland Electric Company that they were defective and after some negotiations the Inland Electric Company without consulting plaintiff agreed to an allowance of 7 cents a piece upon each instrument because thereof.

The alleged defects were remedied by defendant, the Inland Electric Company, furnishing wire for that pur-

pose. There was no evidence that the transformers were in fact defective in that they differed from the articles agreed to be delivered in the original contract between plaintiff and defendant. The witnesses for the defendant agreed with those of plaintiff that although the order was made through the Inland Electric Company, the goods were to be delivered on the original contract as made between plaintiff and defendant.

The court found the issues for the defendant and entered judgment on the finding. Appellee here contends that the evidence shows that the goods were ordered by appellee from the Inland Electric Company and not the plaintiff, but appellee dealt with the Inland Electric Company and not the plaintiff and insists that appellant was a total stranger to the transaction.

We have carefully considered the evidence, not alone as abstracted, but in the record. We cannot agree with the contention of appellee, but on the contrary think that the transaction was clearly between the plaintiff and defendant, and on that evidence plaintiff was entitled to recover from the defendant $375.00 for the goods.

The Inland Electric Company is not a party to this suit. Its rights are determined by its written contract with the plaintiff on which it has its remedy in case it has been legally wronged.

Upon the evidence the plaintiff, appellant, was entitled to recover $375.00 the contract price of the goods sold and delivered. The judgment of the trial court will be reversed and judgment in favor of appellant and against appellee entered here for the amount due.

REVERSED WITH JUDGMENT HERE.

pose. There was no evidence that the transformers were in fact defective in that they differed from the articles agreed to be delivered in the original contract between plaintiff and defendant. The witnesses for the defendant agreed with those of plaintiff that although the order was made through the Inland Electric Company, the goods were to be delivered on the original contract as made between plaintiff and defendant.

The court found the issues for the defendant and entered judgment on the finding. Appellee here contends that the evidence shows that the goods were ordered by appellee from the Inland Electric Company and not the plaintiff, but appellee dealt with the Inland Electric Company and not the plaintiff and insists that plaintiff was a total stranger to the transaction.

We have carefully considered the evidence, not alone in abstracts, but in the record. We cannot agree with the contention of appellee, but on the contrary think that the transaction was clearly between the plaintiff and defendant, and on the evidence plaintiff was entitled to recover from the defendant $278.00 for the goods.

The Inland Electric Company is not a party to this suit. Its rights are determined by its written contract with the plaintiff on which it has its remedy in case it has been legally wronged.

Upon the evidence the plaintiff, appellant, was entitled to recover $278.00 the contract price of the goods sold and delivered. The judgment of the trial court will be reversed and judgment in favor of appellant and against appellee entered here for the amount due.

FINDING OF FACTS.

The court finds that on the 8th day of September, 1916, appellee Hub Electric Company ordered from the appellant, Thordorson Electric Company, a corporation, 500 transformers at the price of 75 cents each and that the same were at the request of appellee, Hub Electric Company, delivered to it on or about that date; that appellee, Hub Electric Company, has not paid for the same and that prior to the time of the beginning of this suit there was due to the Thordorson Electric Company, a corporation, from the Hub Electric Company the sum of $375.00 therefor.

FINDING OF FACTS.

The court finds that on the 8th day of September, 1916, appellee Hub Electric Company ordered from the appellant, Thordarson Electric Company, a corporation, 500 transformers at the price of 75 cents each and that the same were at the request of appellee, Hub Electric Company, delivered to it on or about that date; that appellee, Hub Electric Company, has not paid for the same and that prior to the time of the beginning of this suit there was due to the Thordarson Electric Company, a corporation, from the Hub Electric Company the sum of $375.00 therefor.

93 - 23430

211 I.A. 297

MRS. LOUIS A. HERBERT, Appellee, vs. W. C. MAHON COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered upon trial before the court without a jury.

The evidence for the plaintiff tended to show that the defendant was a manufacturing furrier and that plaintiff was unacquainted with the quality of such goods; that she had been recommended to the defendant by a friend and informed defendant of that fact when she visited its store the latter part of August, 1916, for the purpose of purchasing an Alaska sealskin coat.

Defendant had none of these goods and requested her to return the next day which she did. She was then shown the skins from which the coat was thereafter made. She was informed by the salesman that the skins were "Rice dyed" and they appeared to have the Rice stamp upon them. She was informed by the salesman that these dyes were the "best in the world"; that the skins were dyed with them and that they were the "best that money could buy".

Plaintiff testifies that she relied upon the promises and judgment of appellant, and after negotiations agreed to purchase the garment complete for the sum of $1050.00.

A model of the coat was made in cloth showing the design of it, which plaintiff tried on and found to fit.

MRS. LOUIS A. MERKHERT, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
W. C. MAHON COMPANY, a corporation, Appellant.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment rendered upon trial before the court without a jury.

The evidence for the plaintiff tended to show that the defendant was a manufacturing furrier and that plaintiff was unacquainted with the quality of such goods; that she had been recommended to the defendant by a friend and informed defendant of that fact when she visited its store the latter part of August, 1916, for the purpose of purchasing an Alaska sealskin coat.

Defendant had none of these goods and requested her to return the next day which she did. She was then shown the skins from which the coat was thereafter made. She was informed by the salesman that the skins were "Alice dyed" and they appeared to have the Alice stamp upon them. She was informed by the salesman that these dyes were the "best in the world"; that the skins were dyed with them and that they were the "best that money could buy".

Plaintiff testifies that she relied upon the promises and judgment of appellant, and after negotiations agreed to purchase the garment complete for the sum of $1050.00.

A model of the coat was made in cloth showing the design of it, which plaintiff tried on and found to fit.

The coat itself was completed by the latter part of December. Plaintiff tried it on at defendant's store and two slight alterations were made. The next morning she called for the coat, but did not try it on. A lady employee, however, put the coat on and plaintiff looked at it. It was then carried by defendant's salesman to plaintiff's automobile and she took it away.

The coat was first worn on New Year's eve and on the following day plaintiff observed that the car in which she had been riding was "just littered with dye, black all over." In the afternoon she looked at her evening dress and slippers which she wore the night before and "they were as black as they could be, littered with black all over, the evening dress, the slippers and everything just littered, the bed where I laid them on, the bedspread was so black - well, it has been boiled and washed and we never got it out."

Complaint was made to the defendant and at its request the coat was returned. It was sent to plaintiff again, but as she testifies, "seemed to get worse with the cleaning. The hair and everything seemed to come off worse than before. With the cleaning the hair seemed to break off and the dye seemed to come off more and more." After defendant had several times attempted to remedy the defect in the coat, it was again returned to appellant, when as plaintiff testifies the president of the company told her that he would send the coat on to New York and refund the purchase price which had in the meantime been paid. Later the defendant offered to make plaintiff a new coat, but she refused the offer.

Plaintiff's testimony upon important points is

The coat itself was completed by the latter part of December. Plaintiff tried it on at defendant's store and two slight alterations were made. The next morning she called for the coat, but did not try it on. A lady employee, however, put the coat on and plaintiff looked at it. It was then carried by defendant's salesman to plaintiff's automobile and she took it away.

The coat was first worn on New Year's eve and on the following day plaintiff observed that the car in which she had been riding was "just littered with dye, black all over." In the afternoon she looked at her evening dress and slippers which she wore the night before and "they were as black as they could be, littered with black all over, the evening dress, the slippers and everything just littered, the bed where I laid them on, the bedspread was so black - well, it has been boiled and washed and we never got it out."

Complaint was made to the defendant and at its request the coat was returned. It was sent to plaintiff again, but as she testifies, "seemed to get worse with the cleaning. The hair and everything seemed to come off worse than before. With the cleaning the hair seemed to break off and the dye seemed to come off more and more." After defendant had several times attempted to remedy the defect in the coat, it was again returned to appellant, when as plaintiff testifies the president of the company told her that he would send the coat on to New York and refund the purchase price which had in the meantime been paid. Later the defendant offered to make plaintiff a new coat, but she refused the offer.

Plaintiff's testimony upon important points is

corroborated by that of her two sisters and the chauffeur.

The evidence for the plaintiff conflicted with that offered for the defendant on several points. The president of the company Mr. Mahon and the salesman, Mr. Yost, both testify that when she first went to the store plaintiff asked for Rice's dye without suggestion on their part; that it appeared from her conversation that she knew all about it and its reputation and that she had an opportunity to and did examine the skins from which the coat was made and the coat itself before it was delivered. Mr. Mahon, the president, also denied that he promised to refund the purchase price, but on the contrary says that he told plaintiff he would do everything possible to obtain redress from the dealers who had sold him the skins and if successful in doing it, would gladly refund her money.

The testimony for defendant corroborates that of plaintiff in that it shows the coat was really defective and that its defects could not be remedied.

The pleadings are very indefinite, but their sufficiency has not been questioned, nor is error claimed as to the admission of evidence. Propositions of law were not submitted to the court by either party. At the time of the transaction the Uniform Sales Law (Hurd's Revised Statutes, Chap. 121-a, page 2315) was in force and the provisions of that statute would apply to the transaction, but with the record in the condition it is, we are unable to determine what rule or rules of law the trial court applied to the facts before it.

We doubt the sufficiency of the evidence to sustain a finding of express warranty, but think that the court might have been justified in finding an implied warranty that the

corroborated by that of her two sisters and the chauffeur.

The evidence for the plaintiff conflicted with that offered for the defendant on several points. The president of the company Mr. Eaton and the salesman, Mr. Yost, both testify that when she first went to the store plaintiff asked for Rice's dye without suggestion on their part; that it appeared from her conversation that she knew all about it and its reputation and that she had an opportunity to and did examine the skins from which the coat was made and the coat itself before it was delivered. Mr. Eaton, the president, also denied that he promised to refund the purchase price, but on the contrary says that he told plaintiff he would do everything possible to obtain redress from the dealers who had sold him the skins and if successful in doing it, would gladly refund her money.

The testimony for defendant corroborates that of plaintiff in that it shows the coat was really defective and that its defects could not be remedied.

The pleadings are very indefinite, but their sufficiency has not been questioned, nor is error claimed as to the admission of evidence. Propositions of law were not submitted to the court by either party. At the time of the transaction the Uniform Sales Law (Hurd's Revised Statutes, Chap. 121-a, page 2313) was in force and the provisions of that statute would apply to the transaction, but with the record in the condition it is, we are unable to determine what rule or rules of law the trial court applied to the facts before it.

We doubt the sufficiency of the evidence to sustain a finding of express warranty, but think that the court might have been justified in finding an implied warranty that the

coat should be reasonably fit for the purpose for which it was bought.

Defendant claims there is proof of an examination by plaintiff prior to the delivery of the coat which ought to have revealed its defects to her. The evidence was in conflict on this point and if the court found in favor of the plaintiff thereon, we cannot say the finding was clearly against the weight of the evidence. If it be urged that the plaintiff should have discovered the defect in the dyes upon the slight examination which she made of the garment and the goods, much more we think would it be true that the defendant, an expert in the business who not only had an opportunity to examine the skins prior to the purchase of the same, but also during the manufacture of the coat from the skins, should have ascertained such defect.

If it be conceded as appellant urges that the sale was one of a specified article under its patent or other trade name and that there would, therefore, be no implied warranty as to the fitness of the article for any particular purpose, it would, nevertheless, be true that the defendant would be liable if it should be made to appear that it was negligent in its selection of the articles delivered. That such negligence on the part of defendant existed is, we think, abundantly proved. However, questions of law are not preserved by the record, (Mutual Protective League v. McKee, 223 Ill. 364) and upon a consideration of all the evidence, we cannot say that the findings of the court are clearly and manifestly against its weight.

The judgment will therefore be affirmed.

AFFIRMED.

coat should be reasonably fit for the purpose for which it was bought.

Defendant claims there is proof of an examination by plaintiff prior to the delivery of the coat which ought to have revealed its defects to her. The evidence was in conflict on this point and if the court found in favor of the plaintiff thereon, we cannot say the finding was clearly against the weight of the evidence. If it be urged that the plaintiff should have discovered the defect in the furs upon the slight examination which she made of the garment and the goods, much more we think would it be true that the defendant, an expert in the business who not only had an opportunity to examine the skins prior to the purchase of the same, but also during the manufacture of the coat from the skins, should have ascertained such defect.

If it be conceded as appellant urges that the sale was one of a specified article under its patent or other trade name and that there would, in effect, be no implied warranty as to the fitness of the article for any particular purpose, it would, nevertheless, be true that the defendant would be liable if it should be made to appear that it was negligent in its selection of the articles delivered. That such negligence on the part of defendant existed is, we think, abundantly proved. However, questions of law are not preserved by the record. (Mutual Protective League v. Moker, 221 Ill. 564) and upon a consideration of all the evidence, we cannot say that the findings of the court are clearly and manifestly against its weight.

The judgment will therefore be affirmed.

AFFIRMED.

147 - 23489

JAMES F. BISHOP, Administrator of the estate of JOHN KARAS, deceased, Appellee, vs. INTERNATIONAL HARVESTER COMPANY OF NEW JERSEY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 298

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered by the Municipal Court of Chicago in favor of James F. Bishop, as administrator of the estate of John Karas, deceased.

The evidence showed that plaintiff's intestate, John Karas, on October 22nd, 1912, while employed by appellant, became a member of the defendant's Employes' Benefit Association. Plaintiff sued to recover death benefits claimed to be due under the certificate of membership.

The application of deceased provided, that unless otherwise designated, these benefits should be payable to his wife if living; if not, then to his children, "or, if there be no children nor children's children living, then to _____, if living, and if not living to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representative, * * * *".

At the time plaintiff's intestate died on the 28th day of June, 1915, he was unmarried and left no children nor descendants of children surviving him, but did leave him

147 - 25480

JAMES F. BISHOP, Administrator of the estate of JOHN KARAS, deceased, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
INTERNATIONAL HARVESTER COMPANY OF NEW JERSEY, a corporation, Appellant.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered by the Municipal Court of Chicago in favor of James F. Bishop, as administrator of the estate of John Karas, deceased.

The evidence showed th t plaintiff's intestate, John Karas, on October 22nd, 1919, while employed by appellant, became a member of the defendant's Employes' Benefit Association. Plaintiff sued to recover death benefits claimed to be due under the certificate of membership.

The application of deceased provided, that unless otherwise designated, these benefits should be payable to his wife if living; if not, then to his children, "or, if there be no children nor children's children living, then to _____, if living, and if not living to my father and mother jointly, or the survivor; or, if neither be living, then to my next of kin, payment in behalf of such next of kin to be made to my legal representative. * * *".

At the time plaintiff's intestate died on the 26th day of June, 1919, he was unmarried and left no children nor descendants of children surviving him, but did leave him

surviving, Jacob Karas and Mary Karas, his father and mother respectively.

While no evidence appears in the record upon the subject, it seems to have been conceded that the father and mother of the deceased were residing in Europe, somewhere in Galicia, within the territory in which the great war has been waged and that they had not been heard from since the beginning of the war. Their daughter, a sister of the deceased, does not know whether they are living or dead.

Appellant upon the trial insisted that the administrator had no right to sue on the policy and has by proper objections and motions preserved the question in the record. The plain language of the instrument sued on indicates that the position of appellant must be sustained.

There being no proof in the record from which the death of the parents can either be found as a fact, or presumed, the right of action is in them or the survivor of them, not the administrator. People v. Petrie, 191 Ill. 497.

For the reason indicated, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

surviving, Jacob Karns and Mary Karns, his father and mother respectively.

While no evidence appears in the record upon the subject, it seems to have been conceded that the father and mother of the decedent were residing in Europe, somewhere in Galicia, within the territory in which the great war has been waged and that they had not been heard from since the beginning of the war. Their daughter, a sister of the deceased, does not know whether they are living or dead.

Appellant upon the trial insisted that the administrator had no right to sue on the policy and has by proper objections and motions preserved the question in the record. The plain language of the instrument sued on indicates that the position of appellant must be sustained.

There being no proof in the record from which the death of the parents can either be found as a fact, or presumed, the right of action is in turn to the survivor of them, not the administrator. People v. Ferris, 121 Ill. 497.

For the reason indicated, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

158 - 23501

211 I.A. 299

YELLOW CAB COMPANY,
a corporation,
Appellee,

vs.

JOHN G. CARLSEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below, appellee here, sued for damages sustained by reason of a collision between an automobile owned by it and one driven by appellant.

The collision occurred on Michigan Boulevard in the city of Chicago, a street which extends north and south, while the car owned by the plaintiff was proceeding north on the east side of the Boulevard and appellant was coming south on the same side of the Boulevard at a speed of about twenty miles per hour. In driving at that rate, as well as in travelling on the wrong side of the street, no room is left to doubt that the negligence alleged was established. It is urged that plaintiff was guilty of contributory negligence. It was necessary for the plaintiff to prove that he was at the time of the accident in the exercise of due care.

The cause was tried by the court without a jury and the finding of the trial court on the question of contributory negligence is entitled to the same weight on this appeal as the verdict of a jury.

We think the evidence justified the finding of the court on this question as well as the other controverted facts in regard to the damages which plaintiff sustained. We cannot say that the findings of the court are against the weight of the evidence and the judgment will therefore be affirmed.

AFFIRMED.

YELLOW CAB COMPANY,
a corporation,
Appellee,

vs.

JOHN G. CARLSON,
Appellant.

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff below, appellee here, sued defendant for damages sustained by reason of a collision between an automobile owned by it and one driven by appellant.

The collision occurred on Michigan Boulevard in the city of Chicago, a street upon which vehicles north and south, while the car owned by the plaintiff was proceeding north on the east side of the Boulevard and appellant was coming south on the same side of the Boulevard at a speed of [illegible] twenty miles per hour. In driving at that rate, as well as in travelling on the wrong side of the street, no room is left to doubt that the negligence alleged was established. It is urged that plaintiff was guilty of contributory negligence. It was necessary for the plaintiff to prove that he was at the time of the accident in the exercise of due care.

The cause was tried by [illegible] without a jury and the finding of the trial court on the question of contributory negligence is entitled to the [illegible] weight on this appeal as the verdict of a jury.

We think the evidence justifies the finding of the court on this question as well as the other controverted facts in regard to the damages which plaintiff sustained. We cannot say that the findings of the court are against the weight of the evidence and the judgment will therefore be affirmed.

171 - 23514

MADISON MAGINN,
Appellee,

vs.

JOSEPH LEVY,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff brought suit upon a written contract with the defendant in which it was claimed plaintiff agreed to provide a set of plans for a ventilating system and equip certain premises owned by defendant therewith, for a consideration named in the contract.

The cause was submitted to a jury. After the trial began the defendant by leave of court filed a duly verified plea of non est factum, in which the execution of the contract sued upon was denied. This cast upon the plaintiff the burden of proving its due execution as at common law. Zuel v. Bowen, 78 Ill. 234; Woolverton v. Sumner, 53 Ill. App. 115.

Plaintiff testified that he saw the defendant sign the contract; that they were in defendant's store between 30th and 31st Streets on State at the time; that it was the only contract defendant signed as far as he could remember. The supposed contract was then received in evidence as plaintiff's exhibit one.

Defendant was shown his purported signature upon the document put in evidence and emphatically denied that it was his signature. On cross examination at the request of counsel for plaintiff, a contract was produced by the attorney for defendant, which defendant stated was the contract which he had in fact signed. This contract was offered in

171 - 23314

MAGNUSON MACHINE,
Appellee,

vs.

JOSEPH LEVY,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case plaintiff brought suit upon a written contract with the defendant in which it was claimed plaintiff agreed to provide a set of plans for a ventilating system and equip certain premises owned by defendant therewith, for a consideration named in the contract.

The cause was submitted to a jury. After the trial began the defendant by leave of court filed a duly verified plea of non est factum, in which the execution of the contract sued upon was denied. Issue went upon the plaintiff the burden of proving its due execution as at common law. Zuel v. Bower, 76 Ill. 294; Kooiverton v. Bunner, 55 Ill. App. 116.

Plaintiff testified that he saw the defendant sign the contract; that they were in defendant's store between 50th and 51st streets on State at the time; that it was the only contract defendant signed in fact as he could remember. The supposed contract was then received in evidence as plaintiff's exhibit one.

Defendant was shown his purported signature on the document put in evidence and emphatically denied that it was his signature. In cross examination at the request of counsel for plaintiff, a contract was produced by the attorney for defendant, which defendant stated was the contract which he had in fact signed. This contract was offered in

evidence by plaintiff, but upon objection by defendant that there was a variance between it and the contract declared on, the court excluded it.

Another witness who was familiar with the signature of the defendant also testified that the purported signature on plaintiff's exhibit one was not the defendant's true signature.

There was put in evidence as defendant's exhibit 3, a notice from defendant to the plaintiff dated September 25th, 1913, which was signed by the defendant and according to all the evidence his genuine signature appears thereon. Plaintiff's exhibit 1 and defendant's exhibit 3 (originals) on motion of appellant have been filed in this court for our inspection.

The spacing, slanting and other characteristics of the letters appearing in the genuine signature are so different from the signature which appears upon plaintiff's exhibit 1, that we must hold the purported signature on said plaintiff's exhibit 1 is not the genuine signature of defendant.

In this condition of the record the plea having cast the burden of proof upon the plaintiff, we think the verdict of the jury should have been set aside and a new trial granted. Lincoln v. Stowell, 62 Ill. 84; Peaslee v. Glass, 61 Ill. 94.

We do not agree with the contention of appellant that the signature on plaintiff's exhibit 1 is necessarily a forgery.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

evidence by plaintiff, but upon objection by defendant that there was a variance between it and the contract declared on, the court excluded it.

Another witness who was familiar with the signature of the defendant also testified that the purported signature on plaintiff's exhibit one was not the defendant's true signature.

There was put in evidence as defendant's exhibit 3, a notice from defendant to the plaintiff dated September 25th, 1913, which was signed by the defendant and according to all the evidence his genuine signature appears thereon. Plaintiff's exhibit 1 and defendant's exhibit 3 (originals) on motion of appellant have been filed in this court for our inspection.

The spacing, slanting and other characteristics of the letters appearing in the genuine signature are so different from the signature which appears upon plaintiff's exhibit 1, that we must hold the purported signature on said plaintiff's exhibit 1 is not the genuine signature of defendant.

In this condition of the record the plea having cast the burden of proof upon the plaintiff, we think the verdict of the jury should have been set aside and a new trial granted. Lincoln v. Stowell, 62 Ill. 84; Fessler v. Glass, 61 Ill. 94.

We do not agree with the contention of appellant that the signature on plaintiff's exhibit 1 is necessarily a forgery.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

190 - 23533

WILLIAM O. HOLMBERG,
Appellee,

vs.

GENERAL ELECTRIC COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant here was the garnishee below in a proceeding whereby it was sought to recover for the use of W. O. Holmberg, a judgment creditor of one Charles P. Murchison.

A garnishee summons was served on appellant on the 13th day of April, 1917. The garnishee answered April 24th, 1917, stating that it had no property in its hands or control belonging to the debtor at the time of the service of the writ, nor at the time of the filing of the answer.

Interrogatories were filed by the judgment creditor in reply to which appellant stated that payments of $75.00 each had been made by the garnishee to Murchison the judgment debtor on April 16th and April 28th, 1917, for services to be thereafter rendered.

The district auditor of appellant called by appellee further testified that further payments of $75.00 each had been made to the judgment debtor on May 4th, 1917 and May 30th, 1917, respectively. He also testified that these payments would not have been made unless he had felt sure that Murchison was ready, willing and able to perform the services for which he was paid and that he had subsequently performed such ser-

190 - 25525

WILLIAM O. HOLMBERG,
Appellee,

va.

GENERAL ELECTRIC COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant here was the garnishee below in a proceeding whereby it was sought to recover for the use of W. O. Holmberg, a judgment creditor of one Charles P. Murchison.

A garnishee summons was served on appellant on the 13th day of April, 1917. The garnishee answered April 24th, 1917, stating that it had no property in its hands or control belonging to the debtor at the time of the service of the writ, nor at the time of the filing of the answer.

Interrogatories were filed by the judgment creditor in reply to which appellant stated that payments of $75.00 each had been made by the garnishee to Murchison the judgment debtor on April 16th and April 26th, 1917, for services to be thereafter rendered.

The district auditor of appellant called by appellee further testified that further payments of $75.00 each had been made to the judgment debtor on May 4th, 1917 and May 30th, 1917, respectively. He also testified that these payments would not have been made unless he had felt sure that Murchison was ready, willing and able to perform the services for which he was paid and that he had subsequently performed such ser-

vices and was still in the employ of the company. Appellant moved that it be discharged as garnishee and the court overruled the motion.

Appellant then introduced evidence to the effect that the judgment debtor had been in its employ prior to 1911; that in that year he was transferred to Goshen, Indiana. At the same time an agreement was made with him whereby his salary was to be paid semi-monthly in advance. The receipts for payments which had been made to the judgment debtor on account of his salary were put in evidence and proved such advance payments. Upon this evidence the court found the issues for the plaintiff and entered judgment against the garnishee for $189.60. We think the court erred.

The case of C. & E. I. R. R. Co. v. Blagden, 33 Ill. App. 254, decides the identical question here raised. For the reasons stated in the opinion rendered in that case the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

vices and was still in the employ of the company. Appellant moved that it be discharged as garnishee and the court overruled the motion.

Appellant then introduced evidence to the effect that the judgment debtor had been in its employ prior to 1911; that in that year he was transferred to Goshen, Indiana. At the same time an agreement was made with him whereby his salary was to be paid semi-monthly in advance. The receipts for payments which had been made to the judgment debtor on account of his salary were put in evidence and proved such advance payments. Upon this evidence the court found the issues for the plaintiff and entered judgment against the garnishee for $180.00. We think the court erred.

The case of C. & E. I. R. R. Co. v. Ringlen, 33 Ill. App. 294, decides the identical question here raised. For the reasons stated in the opinion rendered in that case the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

210 - 23554

CLINTON O. SHEPHERD,
Trustee,
Appellant,

vs.

ABRAHAM L. WEBER,
Appellee.

Error to
~~APPEAL FROM~~
CIRCUIT COURT,
COOK COUNTY.

211 I.A. 302

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, who was complainant below, seeks to reverse a decree of the Circuit Court of Cook County.

Complainant had acquired a leasehold and building at 105-9 North Dearborn Street in Chicago, subject to existing leases, one of which was to the defendants Weber and Gallion, demising for a rental of $11,700 suites 1203-4-5-6 in said building for a period of five years. The rentals were payable in installments of $195.00 in advance on the first day of each and every month. The defendants entered into possession of the demised premises May 1st, 1914, and were in possession of the same at the time the bill of complaint was filed.

The lease gave to the lessees the privilege of subletting. The rent was paid up to January 1st, 1915. On May 20th, 1915, complainant caused a judgment in his favor and against the defendants to be entered in the Municipal Court of Chicago under the power to confess judgment contained in the lease for the sum of $605.00.

The bailiff having failed to collect by execution, complainant filed his bill setting up the judgment and its inability to collect the same, alleging that the defendants were collecting rentals from the sub-tenants; that the

210 - 22882

CLINTON C. ARCHBOLD, Trustee, Appellant,	
vs.	
ABRAHAM L. WERNER, Appellee.	

- APPEAL FROM -

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, who was complainant below, seeks to reverse a decree of the Circuit Court of Cook County.

Complainant had acquired a leasehold and building at 103-9 North Dearborn Street in Chicago, subject to existing leases, one of which was to the defendants Leber and Gallion, demising for a rental of $11,700 unless 1203-4-5-6 in said building for a period of five years. The rentals were payable in instalments of $195.00 in advance on the first day of each and every month. The defendants entered into possession of the demised premises May 1st, 1913, and were in possession of the same at the time the bill of complaint was filed.

The lease gave to the lessees the privilege of assigning. The rent was paid up to January 1st, 1915. On May 20th, 1915, complainant caused a judgment in his favor and against the defendants to be entered in the Municipal Court of Chicago under the power to confess judgment contained in the lease for the sum of $600.00.

The bailiff having failed to collect by execution, complainant filed his bill setting up the judgment and its inability to collect the same, alleging in that the defendants were collecting rentals from the sub-tenants; that the

defendants were financially irresponsible and prayed for an accounting, an injunction and a receiver. Gallion made default and Weber answered admitting the execution of the lease as alleged, and that the defendants had entered into possession and were still in possession of the premises and collecting the rents from the sub-tenants; that judgment had been obtained and was unsatisfied, but denied that he was insolvent.

By an amended cross bill filed January 21st, 1917, defendant Weber set up that the lease in question had been executed upon the promise of the lessor to name the building the Sentinel Building unless tenants on the second floor thereof should propose a different name, which agreement had not been kept; that the lessor had agreed to furnish necessary janitor service and maintain the building as a first class office building which he had not done and that by reason thereof, the rental value of the premises had been reduced to not more than $100.00 per month. The cross bill prayed for an accounting, for cancellation of the lease and for an injunction restraining the collection of the judgment, and also the assessment of damages of $25,000, by reason of the failure or refusal to name the building.

The answer of complainant to the cross bill denied liability as to these several matters and the rights of the cross complainant to the relief asked for.

The decree correctly, we think, found against the cross complainant as to the issue of the naming of the building, but found that the cross complainant had a right to have the lease cancelled because of insufficiency of janitor and elevator service, and ordered an accounting to be taken between the parties, in the meantime enjoining the collection

defendants were financially irresponsible and prayed for an accounting, an injunction and a receiver. Gallion made default and Weber answered admitting the execution of the lease as alleged, and that the defendants had entered into possession and were still in possession of the premises and collecting the rents from the sub-tenants; that judgment had been obtained and was unsatisfied, but denied that he was insolvent.

By an amended cross bill filed January 21st, 1917, defendant Weber set up that the lease in question had been executed upon the promise of the lessor to make the building the Montana Building unless tenants on the second floor thereof should propose a different name, which agreement had not been kept; that the lessor had agreed to furnish necessary janitor service and maintain the building as a first class office building which it had not done and that by reason thereof, the rental value of the premises had been reduced to not more than $160.00 per month. The cross bill prayed for an accounting, for cancellation of the lease and for an injunction restraining the collection of the judgment, and also the assessment of damages of $25,000, by reason of the failure or refusal to name the building.

The answer of complainant to the cross bill denied liability as to these several matters and the rights of the cross complainant to the relief asked for.

The decree correctly, we think, found against the cross complainant as to the issue of the naming of the building, but found that the cross complainant had a right to have the lease cancelled because of insufficiency of janitor and elevator service, and ordered an accounting to be taken

of the judgment.

The evidence with regard to the janitor and elevator service furnished has been examined by us with care. It consisted of the evidence of cross complainant and that of his manager of the business in which they were engaged. Their evidence was that the windows were left unwashed; that the wash bowls were continuously dirty; that instead of the three elevators being run continuously, most of the time only two were running, and that the boys would stay out in the lobby gossiping with the girl there, and sometimes would have to wait three or four minutes for the elevator to run back.

Evidence for the cross defendant was to the effect that the janitor and elevator service were first class in every respect; that the elevators ran according to schedule and that competent men were in charge of them. It appears that only at one time was a complaint made in regard to the janitor and elevator service and that was with reference to some dirt which it was claimed had accumulated about a couch. It devolved upon cross complainant to sustain the allegations of his cross bill by a preponderance of the evidence.

It is very difficult to believe that if the janitor and elevator service had been as insufficient as claimed, that only one complaint with reference thereto would have been made. Moreover, it appears that on May 15th, 1915, cross complainant wrote a letter to the agents of the building asking to be released from their lease, he stating as the sole and only reason therefor that the building had not been named and that he was unable to get sub-tenants. In that letter he said, "As a legal proposition, we feel that,

of the judgment.

The evidence with regard to the janitor and elevator service furnished has been examined by us with care. It consisted of the evidence of cross complainant and that of his manager of the business in which they were engaged. Their evidence was that the windows were left unwashed; that the wash bowls were continuously dirty; that instead of the three elevators being run continuously, most of the time only two were running, and that the boys would play out in the lobby gossiping with the girl there, and sometimes would have to wait three or four minutes for the elevator to run back.

Evidence for the cross defendant was to the effect that the janitor and elevator service were first class in every respect; that the elevators ran according to schedule and that complaints were made in charge of them. It appears that only at one time was a complaint made in regard to the janitor and elevator service and that was with reference to some dirt which it was claimed had accumulated about a month. It devolved upon cross complainant to sustain the allegations of his cross bill by a preponderance of the evidence.

It is very difficult to believe that if the janitor and elevator service had been as insufficient as claimed, that only one complaint with [illegible] thereto would have been made. Moreover, it appears [illegible] on July 1st, 1921, cross complainant wrote a letter to the agents of the building asking to be released from their lease, he stating as the sole and only reason therefor that the building had not been named and that he was unable to get sub-tenants. In that letter he said, "As a legal proposition, we feel that,

since the building was not named on the first of May last year, and since the promise was made to us by Mr. Cleary that the name of the building should be changed by the first of May, 1914, that the lease was not complied with by the owners and that we are warranted to have the lease cancelled." In this letter not a word of complaint appears as to janitor and elevator service. We are satisfied that the claim in that regard was an after thought and is not the real reason why cross complainant seeks to have the lease cancelled. But if we would assume that all of the evidence offered by cross complainant on this subject was uncontradicted, it would in our opinion not be sufficient to establish a constructive eviction, nor give appellee the right to cancel the lease. Barrett v. Brodie, 158 Ill. 479; Risser v. O'Connell, 172 Ill. App. 64; Delmar Investment Co. v. Blumenfield, 118 Mo. App. 308.

The decree was erroneous and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

since the building was not named on the first of May last year, and since the promise was made to us by Mr. Gleason that the name of the building should be changed by the first of May, 1914, that the issue was not complied with by the owners and that we are convinced to have the issue cancelled." In this letter not a word of complaint appears as to jeopardy and elevator service. We are satisfied that the claim in that regard was an after thought and is not the real reason why cross complainant seeks to have the issue cancelled. But if we would assume in spite of the evidence of ill by cross complainant or this subject was uncontradicted, it would in our opinion not be sufficient to establish a constructive eviction, nor give appellee the right to cancel the lease. Barrett v. Hardie, 148 Ill. 449; Kiser v. O'Donnell, 177 Ill. App. 64; Palmer Investment Co. v. Thornfield, 118 Ill. App. 308.

The decree was erroneous and it will therefore be reversed and the cause remanded.

Reversed and remanded.

203 - 23564

EDWARD A. CIVILINSKI, a minor, by Julia Civilinski, his next friend, Appellee, vs. S. MASON MEEK, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 303

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued by his next friend, and in his statement of claim alleged that he lived with his parents who were tenants of defendant in an apartment appurtenant to which was a front "stoop" extending from the sidewalk in front of the premises to the first floor thereof; that on each side of said stairway or "stoop" was a handrail; that the stairway was used as an entrance and exit way by the different tenants who lived in the building; that the defendant had control of the stairway and handrail, and that it was his duty to keep them reasonably safe which he did not do, by means whereof the plaintiff while in the exercise of due care was injured etc.

The affidavit of merits denied the premises were out of repair; alleged that the accident was due to plaintiff's fault; that the railing was wantonly and maliciously loosened by someone to the defendant unknown of which plaintiff had notice, but of which defendant had no knowledge; that the premises had been put in good repair a short time before the accident and that it was the duty of the tenants to notify the defendant of any want of repair, but that plaintiff did not do so.

203 - 23554

HOWARD A. GIVILINSKI, a minor, by Julia Givilinski, his next friend, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
S. MASON MECK, Appellant.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, sued by his next friend, and in his statement of claim alleged that he lived with his parents who were tenants of defendant in an apartment apartment to which was a front "stoop" extending from the sidewalk in front of the premises to the first floor thereof; that on each side of said stairway or "stoop" was a handrail; that the stairway was used as an entrance and exit way by the different tenants who lived in the building; that the defendant had control of the stairway and handrail, and that it was his duty to keep them reasonably safe which he did not do, by means whereof the plaintiff while in the exercise of due care was injured etc.

The affidavit of merits denied the premises were out of repair; alleged that the accident was due to plaintiff's fault; that the railing was wantonly and maliciously loosened by someone to the defendant unknown of which plaintiff had notice, but of which defendant had no knowledge; that the premises had been put in good repair a short time before the accident and that it was the duty of the tenants to notify the defendant of any want of repair, but that plaintiff did not do so.

The case was submitted to a jury upon instructions to which defendant, appellant here, neither made objection nor took exception, and therefore, cannot be complained of. Scott v. Chicago Binder & File Co., 170 Ill. App. 391.

The issues as to defendant's negligence, plaintiff's contributory negligence, notice and the amount of plaintiff's damages (on all of which points the evidence was conflicting) were submitted to the jury under these instructions and the verdict against defendant was approved by the trial court. We see no reason why the judgment should be disturbed on any of these grounds.

Appellant further complains of a variance in that the statement of claim alleged the north handrail to be defective, while the proof showed it was the south handrail. At the time the evidence was offered, the defendant did not object, nor did he prior to the submission of the case to the jury, make any motion to exclude it. This was necessary in order to preserve this question for review. Carney v. Marquette Coal Mining Co., 260 Ill. 225.

Appellant also complains that the court received incompetent testimony in permitting an expert of the plaintiff to testify without showing proper qualifications. No objections to the specific questions when asked, nor motion to strike the evidence complained of appears in the record and for that reason the point is not reviewable here.

Appellant argues that the evidence failed to show that the stairway of which the handrail was a part was under the control of the defendant landlord at the time of the injury. Plaintiff's statement of claim alleged that it was, and defendant's affidavit of merits did not deny that such was the fact. There was uncontradicted evidence from which

The case was submitted to a jury upon instructions to which defendant, appellant here, neither made objection nor took exception, and therefore, cannot be complained of. Scott v. Chicago Binder & Vile Co., 171 Ill. App. 201.

The issues as to defendant's negligence, plaintiff's contributory negligence, notice and the amount of plaintiff's damages (on all of which points the evidence was conflicting) were submitted to the jury under these instructions and the verdict against defendant was approved by the trial court. We see no reason why the judgment should be disturbed on any of these grounds.

Appellant further complains of a variance in that the statement of claim alleged the north boardwalk to be defective, while the proof showed it was the south boardwalk. At the time the evidence was offered, the defendant did not object, nor did he prior to the submission of the case to the jury, make any motion to conform it. This was necessary in order to preserve this question for review. Carney v. Marquette Coal Mining Co., 200 Ill. 295.

Appellant also complains it the court received incompetent testimony in permitting an expert of the plaintiff to testify without showing proper qualifications. No objections to the specific questions were made, nor motion to strike the evidence complained of appears in the record and for that reason the point is not reviewable here.

Appellant argues that the evidence failed to show that the stairway of which the boardwalk was a part was under the control of the defendant landlord at the time of the injury. Plaintiff's statement of claim alleged that it was, and defendant's affidavit of merits did not deny that such was the fact. There was uncontradicted evidence from which

the jury could reasonably find this to be so.

The judgment which is for $350.00 is not excessive and it will be affirmed.

AFFIRMED.

the jury could reasonably find this to be so.

The judgment which is for $350.00 is not excessive and it will be affirmed.

AFFIRMED.

211/304

316 - 23661

Filed May 14, 1918

LAWRENCE M. ROCK,
Appellee,

vs.

E. J. CHRESTEIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 304

MR. JUSTICE FATCHETT DELIVERED THE OPINION OF THE COURT.

On the motion of appellee the stenographic report of the evidence taken in the trial court has heretofore been stricken and a motion of appellant to set aside the said order has been reserved to the hearing.

The judgment from which the appeal was taken was entered in the Municipal Court of Chicago on June 7th, 1917, and the trial judge then entered an order extending the time in which a stenographic report or bill of exceptions might be presented to ninety days from that date. This time expired September 7th, 1917.

The stenographic report was not filed with the clerk until September 21st, 1917, and it was signed by the trial judge on the same date nunc pro tunc as of September 7th, 1917. There appears upon it this endorsement:

> "I hereby certify that the foregoing document in the absence from Chicago of Judge Wells, was presented to me in open court to be signed this 7th day of September, 1917.
>
> Harry Olson,
> Judge of the Municipal Court
> of Chicago."

It is argued by appellant that the endorsement of Judge Olson on September 7th furnished a sufficient basis for the entry of the nunc pro tunc order of the trial judge, Judge Wells, on September 25th. We do not think so in the absence of an affirmative showing of due

diligence on the part of appellant by the certificate of the trial judge. This is the rule laid down in Keefe v. Rosenwald, 266 Ill. 543, and following that rule we must now deny the motion to set aside the order striking this stenographic report or bill of exceptions.

As the common law record appears to be without error, the judgment of the trial court must be affirmed.

AFFIRMED.

275 - 23620

PERRY M. CALDWELL, doing business as Sixty-Third and Halsted Garage, Appellant	)	Appeal from
vs.	)	Municipal Court
CHICAGO CITY RAILWAY COMPANY, a corporation, Appellee	)	of Chicago

211 I.A. 310

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellant brought suit for damages owing to injury to one of its automobiles alleged to have been caused by the negligence of the appellee in the operation of a street car. The case was tried without a jury and at the close of the evidence judgment was entered in favor of the appellee against the appellant, for costs.

On Sunday, April 4, 1915, at about 8:30 a.m. one Moss hired a taxicab (a Stevens-Duryea car) of appellant to take his mother to a certain railroad station. The car was driven by one Hamilton, an employee of the appellant. It was a rainy day and the streets were wet. The automobile proceeded northon the east side of Wabash avenue going towards 26th street. As it neared 26th street, a street car belonging to the appellee came from the east going west on the latter street. The automobile and the street car collided near or just west of the center of the intersection of the two streets. As a result of the concussion, the street car left the tracks and came to a stop a little west of the west curb, being more on 26th street than on Wabash avenue. The automobile came to a stop

275 - 25680

HENRY M. CALDWELL, doing business as Sixty-Third and Halsted Garage,	
appellant	Appeal from
vs.	Municipal Court
CHICAGO CITY RAILWAY COMPANY, a corporation,	of Chicago
appellee	

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellant brought suit for damages owing to injury to one of its automobiles alleged to have been caused by the negligence of the appellee in the operation of a street car. The case was tried without a jury and at the close of the evidence judgment was entered in favor of the appellee against the appellant, for costs.

On Sunday, April 4, 1915, at about 8:30 a.m. one Moss hired a taxicab (a Stevens-Duryea car) of appellant to take his mother to a certain railroad station. The car was driven by one Hamilton, an employee of the appellant. It was a rainy day and the streets were wet. The automobile proceeded northern the east side of Western avenue going towards 63rd street. As it neared 63rd street, a street car belonging to the appellee came from the east going west on the latter street. The automobile and the street car collided near or just west of the center of the intersection of the two streets. As a result of the collision, the street car left the tracks and came to a stop a little west of the west curb, being more on 63rd street than on Western avenue. The automobile came to a stop

when against or near the curb at the southwest corner of 26th street and Wabash avenue. It was almost completely destroyed and was evidently of little value after the collision. Prior to the injury it was worth from $1000.00 to $1100.00, but afterwards not more than $70.00. There was no damage to the street car except the breaking of some glass. There is some conflict as to the speed at which the automobile and the street car were going about the time of and just prior to the collision. The witness Anna Moss said that the speed of the automobile just before reaching 26th street was from six to eight miles an hour and that the street car was running very fast. The witness Dr. Moss said that the automobile slowed down and was going about eight miles an hour and that the street car was traveling very fast. The witness Nimz testified that the automobile was going about six to seven miles an hour and that the street car was traveling about twenty miles an hour. The witness Dr. McLaughlin testified that the automobile was going fairly fast, about ten miles an hour; that the street car, between Michigan avenue and Wabash avenue, was running about eight miles an hour; that it slowed up at the east side of Wabash avenue. The witness Braico testified that the automobile was going over ten miles an hour. The motorman testified that he stopped the street car on the east side of Wabash avenue. The conductor in charge of the street car testified that the automobile was going twenty-five or thirty miles an hour; that the street car stopped on the east side of Wabash avenue and then traveled at about five miles an hour.

when leaving or near the curb at the southeast corner of 26th street and Woodson avenue. It was almost completely destroyed and was evidently of little value after the collision. Prior to the injury it was worth from $1000.00 to $1100.00, but afterwards not worth more than $50.00. There was no damage to the street car except the breaking of some glass. There is some conflict as to the speed at which the automobile and the street car were going about the time of and just prior to the collision. The witness Rose said that the speed of the automobile just before reaching 26th street was from six to eight miles an hour and that the street car was running very slow. The witness Mr. Rose said that the automobile slowed down and was going about eight miles an hour at the time. The street car was traveling very slow. The witness also testified that the automobile was going about six to seven miles an hour and that the street car was traveling at about twenty miles an hour. The witness Mr. Wolfgang testified that the automobile was going fairly fast, about ten miles an hour; that the street car, between Morgan avenue and Topsey avenue, was running about eight miles an hour; it slowed up at the west side of Topsey avenue. The witness Bruce testified that the automobile was going over ten miles an hour. The motorman testified that he stopped the street car on the east side of Topsey avenue. The conductor in charge of the street car testified that the automobile was going twenty-five or thirty miles an hour. The street car stopped on the east side of Topsey avenue and then traveled at about five miles an hour.

There is also a conflict in the evidence as to the precise circumstances at the time of the collision. The witness Anna Moss testified that the street car struck the automobile on the right side back of the first wheel and that the automobile was thrown into the gutter on the left hand, and that the street car was thrown off the track. The witness Dr. Moss testified that the driver of the automobile applied the brakes but as the road was slippery, the automobile skidded and the driver undertook to turn it west; that the street car struck the automobile near the back wheel on the right hand side and that the automobile was thrown against the curb on the southwest corner of the street; that at the time of the collision the driver was trying to turn west to avoid a collision and get out of the way of the car; that the street car was thrown off the track.

The witness Nimz testified that the street car struck the automobile in the middle on the right side and the automobile was thrown up on the curb at the southwest corner and that the street car was sent off the track on the other side near to the curb. Dr. McLaughlin testified that the automobile was traveling north a little left of the center on Wabash avenue; that it struck the street car near the end of the forward wheels; that the street car went into the gutter on Wabash; that the automobile stopped a little west of the west curb stone in Wabash avenue; that the collision was "soft"; that there was no jar.

The witness Braico testified that the automobile struck the car about five feet from the front; that the collision occurred about fifty feet west of the center of the intersection of the streets; that first the right front wheel of the automobile struck the car and then the other wheel came in contact and the street car started to go off the track;

There is also a conflict in the evidence as to the precise circumstances at the time of the collision. The witness Anna Rose testified that the street car struck the automobile on the right side near of the front wheel and that the automobile was thrown into the gutter on the left hand, and that the street car was thrown off the track. The witness Mr. Rose testified that the driver of the automobile applied the brakes but as the road was wet, the automobile skidded and the driver endeavored to turn it back; that the street car struck the automobile near the back wheel on the right hand side and that the automobile was thrown against the curb on the southwest corner of the street; that at the time of the collision the driver was trying to turn back to avoid a collision and got out of the way of the car; that the street car was thrown off the track.

The witness Lina testified that the street car struck the automobile in the middle on the right side and the automobile was thrown up on the curb at the southwest corner and in f the street car was off the track on the other side near to the curb. Mr. Cunningham testified that the automobile was travelling north a little left of the center on Webster Avenue; that it struck the street car near the end of the forward truck; that the street car went into the gutter on Webster; that the automobile stopped a little west of the west curb stone in Webster Avenue; that the collision was "soft"; that there was no jar.

The witness Milton testified that the automobile struck the car about five feet from the front; that the collision occurred about fifty feet west of the center of the intersection of the streets; that first the right front wheel of the automobile struck the car and then the other wheel came in contact and the street car started to go off the track;

that it struck the street car about five feet from the front end; that the force of the automobile pushed the car off the tracks.

The motorman testified that the front end of the street car did not strike the front wheel of the automobile. The conductor of the street car testified that the automobile ran into the front end of the car and knocked the street car off the tracks.

It is the contention of the appellant that the judgment of the trial court should be reversed as contrary to the weight of the evidence. Evidently the trial judge found in favor of the appellee on the ground that the appellant had not proven his cause of action by a preponderance of the evidence. It is the contention of the appellee that "the physical situation together with the testimony of defendant's witnesses establishes that defendant was not negligent in operating the car at the time in question." Of course, the finding of the trial court without a jury, where the evidence is conflicting, will not be disturbed unless against the manifest weight of the evidence; and, in considering the weight of the evidence, this court necessarily, under the law, will consider the superior opportunity of the trial court in that it sees and hears the witnesses. Salboy v. Hayes, 267 Ill. 521; Nelson v. McKeown, 203 Ill. App. 231; Rosenbluth v. Heintz Food Co., Ill. App. 225.

The evidence of three witnesses, Dr. McLaughlin, the motorman and the conductor, that the street car either slowed up or stopped at the east side of Wabash avenue, together with the evidence that the street was wet and slippery, and that the collision took place near the center, or west of the center, of the intersection of the two streets; and the evidence of Dr. Moss that the driver of the automobile applied

that it struck the street car about five feet from the front end; that the force of the automobile pushed the car off the tracks.

The motorman testified that the front end of the street car did not strike the front wheel of the automobile. The conductor of the street car testified that the automobile ran into the front end of the car and knocked the street car off the tracks.

It is the contention of the appellant that the judgment of the trial court should be reversed as contrary to the weight of the evidence. Evidently the trial judge found in favor of the appellee on the ground that the appellant had not proven his cause of action by a preponderance of the evidence. It is the contention of the appellee that "the physical situation together with the testimony of defendant's witnesses establishes that defendant was not negligent in operating the car at the time in question." Of course, the finding of the trial court without a jury, where the evidence is conflicting, will not be disturbed unless against the manifest weight of the evidence; and, in considering the weight of the evidence, this court necessarily, under the law, will consider the superior opportunity of the trial court in that it sees and hears the witnesses. Hurley v. Hayes, 207 Ill. 621; Nelson v. Jackson, 102 Ill. App. 621; Rosenblatt v. Rolfe Food Co., 111. App. 226.

The evidence of three witnesses, Mr. Kavanaugh, the motorman and the conductor, that the street car either slowed up or stopped at the east side of Halsted Street, together with the evidence that the street was wet and slippery, and that the collision took place near the center, or west of the center, of the intersection of the two streets; and the

the brakes, but, as the road was slippery, the automobile skidded and the driver undertook to turn it west; and the evidence that the impact threw the street car off the tracks to the northwest, all taken in conjunction with the evidence of the appellee's witnesses, which the trial judge may have been justified in believing, that the street car was traveling at a reasonable rate of speed, gives rise to the conclusion, in our opinion, that the appellant failed to make out his cause of action by a preponderance of the evidence.

It was claimed by appellant that the trial judge erred in admitting in evidence a conversation which was testified to as having taken place between Dr. McLaughlin, a passenger on the street car, and the driver of the automobile, immediately after the accident. Dr. McLaughlin testified as follows: "I went over and spoke to him (referring to the driver of the automobile) and said, 'What were you trying to do with us, put us out of business?' He said, looking at the car, and the gas and water was running all over the street, and he says, 'I guess the brake didn't work'." The record shows that counsel for appellant objected, but, when the trial judge said it was competent, acquiesced and, himself, stated, "It is part of the res gestae probably." We cannot consider, therefore, that any legal objection was made to the admissibility of the evidence.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

the brakes, but, as the road was slippery, the automobile skidded and the driver undertook to turn it west; and the evidence that the impact threw the street car off the tracks to the northwest, all taken in conjunction with the evidence of the appellee's witnesses, which the trial judge may have been justified in believing, that the street car was travelling at a reasonable rate of speed, gives rise to the conclusion, in our opinion, that the appellant failed to make out his cause of action by a preponderance of the evidence.

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Finding no error in the record the judgment is affirmed.

A Affirm.

298 - 23643

NORMAN CARROLL, Appellee, vs. A. GOLDSTEIN, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the appellee against the appellant for damages for a breach of a contract to purchase certain real estate. Appellee having recovered a verdict and judgment in the sum of $437.50, this appeal was taken therefrom.

The theory of the appellee is that appellant promised to buy a certain ten lots - upon which appellee's commission would be $437.50 - providing the appellee would bring about a sale of certain property which appellant then owned; that appellee carried out his part of the bargain so that appellant's property was sold; that appellant then refused and failed to carry out his promise to buy the aforesaid ten lots, and, therefore, became liable. On the other hand it is the claim of the appellant that no binding contract was made; that there was no definite agreement as to the purchase price of the lots or as to their number and that there was no legally binding promise on the part of the appellee.

Appellee, a real estate salesman for W. H. Briti-

208 - 23643

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MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is a suit brought by the appellee against the appellant for damages for a breach of a contract to purchase certain real estate. Appellee having recovered a verdict and judgment in the sum of $437.50, this appeal was taken therefrom.

The theory of the appellee is that appellant promised to buy a certain ten lots - upon which appellee's commission would be $437.50 - providing the appellee would bring about a sale of certain property which appellant then owned; that appellee carried out his part of the bargain so that appellant's property was sold; that appellant then refused and failed to carry out his promise to buy the aforesaid ten lots, so , therefore, became liable. On the other hand it is the claim of the appellant that no binding contract was made; that there was no definite agreement as to the purchase price of the lots or as to their number and that there was no legally binding promise on the part of the appellee.

Appellee, a real estate salesman for . H. Kniti-

gan and Co., having a contract with the latter company that he should receive a commission of seven per cent on the sale price of any lots in Marquette Manor Addition which he might sell, undertook, in the summer of 1915, to persuade the appellant to purchase certain lots in that Addition. The evidence of the appellee is to the effect that he got appellant interested in the property and told him that the lots 29 to 37 in Block 2 of Marquette Manor Addition could be bought for $625.00 a lot, ten per cent cash and monthly payments of $10.00 a month; that he had a number of conversations with appellant as to the property and in the early part of August, 1915, they went out to see the lots; that he "told him that he ought to take ten or fifteen of those lots; that they were worth the money and it was growing up very fast out there and it was a good place for him to build"; that appellant said he thought so too; "that he would take those lots and perhaps more of them"; that he, appellee, tried to get him to make a deposit and sign a contract; that appellee finally said "he didn't think he had quite enough money to take all those ten lots at once"; that after being further urged, appellee said, "I have got a piece of property on Western avenue, if you will help me to sell that, I will take those lots"; that appellee then responded, "I said I would look into it, and try to do it"; that at that time, at the office, they had a plat of the Addition and that the lots referred to in their conversation were the lots numbered 29 to 37 in Block 2, Marquette Manor Addition; that subsequently he, appellee, investigated the property which appellant desired to sell, and called on a number of people in re-

gan and Co., having a contract with the latter company that he should receive a commission of seven per cent on the sale price of any lots in Marquette Manor Addition which he might sell, undertook, in the summer of 1915, to persuade the appellant to purchase certain lots in that Addition. The evidence of the appellee is to the effect that he got appellant interested in the property and told him that the lots 29 to 37 in Block 2 of Marquette Manor Addition could be bought for $625.00 a lot, ten per cent cash and monthly payments of $10.00 a month; that he had a number of conversations with appellant as to the property and in the early part of August, 1915, they went out to see the lots; that he "told him that he ought to take ten or fifteen of those lots; that they were worth the money and it was growing up very fast out there and it was a good place for him to build"; that appellant said he thought so too; "that he would take those lots and perhaps more of them"; that he, appellee, tried to get him to make a deposit and sign a contract; that appellee finally said "he didn't think he had quite enough money to take all those lots at once"; that after being further urged, appellee said, "I have got a piece of property on Western avenue, if you will help me to sell that, I will take those lots"; that appellee then responded, "I said I would look into it, and try to do it"; that at that time, at the office, they had a plat of the Addition and that the lots referred to in their conversation were the lots numbered 29 to 37 in Block 2, Marquette Manor Addition; that subsequently he, appellee, investigated the property which appellant desired to sell, and called on a number of people in re-

gard to it, and finally listed it with a real estate agent, Bagdziunas; that he saw the latter several times thereafter; that appellant called him up, meanwhile, and he told him he was working on it and, finally, in September, Bagdziunas told appellee he had an offer for appellant's property; that Bagdziunas then got the offer in writing and a deposit, and an offer of $5700.00, was submitted to appellant; that afterwards, in the latter part of September, he got appellant to meet Bagdziunas and the prospective purchaser and talk the matter over; that subsequently an offer of $6,000.00 was made to Bagdziunas, for appellant's property and that information appellee communicated to appellant and the latter went to see Bagdziunas, and on October 7, 1915, a contract for the sale of appellant's property for $6,000.00 was made; that within a week, appellant, at the solicitation of appellee, went to the office of the latter and appellee asked him "if he was ready now to make a deposit to secure those lots. He said he didn't want to do it then but he would just as soon as he got his money out of this deal - just as soon as it was closed. He told me I need not worry that he would take care of it, that he meant to take those lots"; that subsequently he telephoned him "that the other lots were selling" and he "wanted him to get those ten lots and he said he wanted the lots but he still wanted to wait until the deal was closed."

That he, appellee, on November 4, 1915, received a check for $30.00 as a commission, from Bagdziunas, which amount he turned over to appellant, telling the latter that he, appellee, expected to get his compensation from the

gard to it, and finally listed it with a real estate agent, Bagdaiunas; that he saw the latter several times thereafter; that appellant called him up, meanwhile, and he told him he was working on it and, finally, in September, Bagdaiunas told appellee he had an offer for appellant's property; that Bagdaiunas then got the offer in writing and a deposit, and an offer of $2,700.00, was submitted to appellant; that afterwards, in the latter part of September, he got appellant to meet Bagdaiunas and the prospective purchaser and talk the matter over; that subsequently an offer of $2,000.00 was made to Bagdaiunas, for appellant's property and that information appellee communicated to appellant and the latter went to see Bagdaiunas, and on October 7, 1913, a contract for the sale of appellant's property for $2,400.00 was made; that within a week, appellant, at the solicitation of appellee, went to the office of the latter and appellee asked him "if he was ready now to take a deposit to secure those lots. He said he didn't want to do it then but he would just as soon as he got his money out of this deal - just as soon as it was closed. He told me I need not worry that he would take care of it, that I meant to take those lots"; that subsequently he telephoned him "that the other lots were selling" and he "wanted him to get those ten lots and he said he wanted the lots but he still wanted to wait until the deal was closed."

That he, appellee, on November 4, 1913, received a check for $30.00 as a commission, from Bagdaiunas, which amount he turned over to appellant, telling the latter that he, appellee, expected to get his compensation from the

Marquette Manor Addition sale; that appellant "accepted the check and said that was all right - that was according to his understanding"; that appellant then gave him a receipt for $30.00, "being refund of his commission for sale of my Western Avenue property;" that subsequently, appellee had a number of conversations with appellant in regard to the purchase of the lots in Marquette Manor Addition; that about the first of December, 1915, he asked him to "take up those lots, that is, make a deposit on them"; "and he objected, saying there was plenty of time"; "that he didn't want to do it just then but * * * that he would do it"; that again, within the week, appellant said he would "make up a contract"; that he did not want to do it until later; that the contract of appellee with his employer Britigan was that he should receive seven per cent commission, which, on the ten lots in question, at $625.00 a piece, amounted to $437.50; that none of the lots in question up to the time of the trial had been sold; The evidence of the witness Deck was to the effect that on a certain Saturday in October or November, 1915, she heard appellee ask appellant "if he was ready to take the ten lots that he had promised to take"; that appellant said, "Well, he would be willing to take them as soon as his business - as soon as the deal was closed - the Western Avenue deal was closed, but he didn't have the money to take them right away"; that appellee asked appellant, "how soon he would take the ten lots; how soon he would purchase them"; that appellant said, "he would purchase them as soon as the deal was closed on Western Avenue"; that appellant said "As soon as this is closed he would take the Manor Addition lots. The ten lots." That he would buy them as

Marquette Manor Addition sale; that appellant "accepted the check and said that was all right - that was according to his understanding"; that appellant then gave Mim a receipt for $30.00, "being refund of his commission for sale of my Western Avenue property;" that subsequently, appellee had a number of conversations with appellant in regard to the purchase of the lots in Marquette Manor Addition; that about the first of December, 1913, he asked him to "take up those lots, that is, make a deposit on them"; "and he objected, saying there was plenty of time"; "that he didn't want to do it just then but * * * that he would do it"; that again, within the week, appellant said he would "make up a contract"; that he did not want to do it until later; that the contract of appellee with his employer Brilliam was that he should receive seven percent commission, which, on the ten lots in question, at $825.00 a piece, amounted to $4437.50; that none of the lots in question up to the time of the trial had been sold; The evidence of the witness Mack was to the effect that on a certain Saturday in October or November, 1913, the board appellee and appellant "if he was ready to take the ten lots that he had promised to take"; that appellant said, "Well, he would be willing to take them as soon as his business - as soon as the deal was closed - the Western Avenue deal was closed, but he didn't have the money to take them right away"; that appellee asked appellant, "how soon he would take the ten lots; how soon he would purchase them"; that appellant said, "he would purchase them as soon as the deal was closed on Western avenue"; that appellant said "As soon as this is closed he would take the Manor Addition lots. The ten lots." That he would buy them as

soon as the deal was closed. The evidence of Williams, is to the effect that on a certain Saturday in August, 1915, he heard appellant say that he would like to buy the lots if appellee "could dispose of some property he has got on Western Avenue - if he could do that why he would be in a position to buy ten or probably fifteen lots, but he would take ten for a certainty if Mr. Carroll could dispose of his property"; that appellee said, "Well, I will call and look into it and see what I can do." The evidence of the witness Wigman is to the effect that he heard some conversation between appellee and appellant; that appellant had some other property on Western Avenue; that if he didn't have that property he would buy some lots; that appellant said that he would look into the matter of the Western Avenue property.

The appellant Goldstein admitted that he went out to see the property but testified that as there was neither water nor sewer in, he told appellee he could not use the lots; that he never told appellee that he would buy the lots after he had sold the Western Avenue property; that nothing was said when the check for $30.00, as part of the commission was returned to him; that that deal was closed on November 4, 1915.

It is contended by the appellant that the conduct of the parties as shown by the evidence did not create an obligation rendering him liable to suit by the appellee. On the other hand, the appellee claims that the appellant, having promised to purchase the lots providing appellee enabled appellant to sell his property, and

soon as the deal was closed. The evidence of Williams, is to the effect that on a certain Saturday in August, 1915, he heard appellant say that he would like to buy the lots if appellee "could dispose of some property he has got on Western Avenue - if he could do that why he would be in a position to buy ten or probably fifteen lots, but he would take ten for a certainty if Mr. Carroll could dispose of his property"; that appellee said, "Well, I will call and look into it and see what I can do." The evidence of the witness Wigman is to the effect that he heard some conversation between appellee and appellant; that appellant had some other property on Western Avenue; that if he didn't have that property he would buy some lots; that appellant said that he would look into the matter of the Western Avenue property.

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It is contended by the appellant that the conduct of the parties as shown by the evidence did not create an obligation rendering him liable to suit by the appellee. On the other hand, the appellee claims that the appellant, having promised to purchase the lots providing appellee enabled appellant to sell his property, and

appellee having given his services, which resulted in the sale of appellant's property, appellant thereby became bound. When the appellant stated to the appellee that he would buy the ten lots providing appellee brought about the sale of appellant's property, it was in the nature of a continuing offer on the part of appellant, and the moment the consideration was furnished on the part of appellee, that is, the services rendered which resulted in the sale of appellant's property, there came into existence a unilateral contract, executed on the part of appellee and binding appellant to purchase the lots in question. It may well be that, at any time before the services were rendered by appellee, the offer of appellant might have been withdrawn, but, not being withdrawn and appellant's property having been sold, through the help of appellee, it gave rise to a binding obligation on the part of appellant. Plumb v. Campbell, 129 Ill. 101. As to the matter of definiteness of the terms; the evidence shows sufficiently clearly that the offer on the part of appellant related to ten particular lots at a given price.

It is contended by appellant that the alleged contract, not being in writing, was void under the Statute of Frauds. Inasmuch, however, as appellant in his affidavit of merits makes no mention whatever of that defense, that claim of the appellant is untenable. Clayton v. Lemen, 233 Ill. 435. In the latter case the court said,"If the Statute of Frauds is not pleaded, the case must be considered and decided without reference to it and it cannot be considered in this court when not pleaded in the court below." Finucan v. Kendig, 109 Ill. 198; Sanford v. Davis,

appellee having given his services, which resulted in the sale of appellant's property, appellant thereby became bound. When the appellant stated to the appellee that he would buy the ten lots providing appellee brought about the sale of appellant's property, it was in the nature of a continuing offer on the part of appellant, and the moment the consideration was furnished on the part of appellee, that is, the services rendered which resulted in the sale of appellant's property, there came into existence a unilateral contract, executed on the part of appellee and binding appellant to purchase the lots in question. It may well be that, at any time before the services were rendered by appellee, the offer of appellant might have been withdrawn, but, not being withdrawn and appellant's property having been sold, through the help of appellee, it gave rise to a binding obligation on the part of appellant. Jump v. Campbell, 129 Ill. 101. As to the matter of definiteness of the terms; the evidence shows sufficiently clearly that the offer on the part of appellant related to ten particular lots at a given price.

It is contended by appellant that the alleged contract, not being in writing, was void under the statute of frauds. Inasmuch, however, as appellant in his affidavit of merits makes no question whatever of that defense, that claim of the appellant is untenable. Clayton v. Legan, 285 Ill. 435. In the latter case the court said,"If the statute of frauds is not pleaded, the case must be considered and decided without reference to it and it cannot be considered in this court when not pleaded in the court below." Winnegan v. Kendig, 103 Ill. 198; Sanford v. Lewis,

181 id. 570; Highley v. Metzger, 187 id. 237; McClure v. Otrich, 118 id. 320. As to the instruction complained of, we are of the opinion that it was, under the circumstances, entirely unobjectionable.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

181 id. 570; Hardley v. Metzger, 187 id. 327; McClure v. Ottion, 118 id. 320. As to the instruction complained of, we are of the opinion that it was, under the circumstances, entirely unobjectionable.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

322 - 23667

211 I.A. 316

JOHN F. KERNAN, JR.,
Appellee,

vs.

ADVANCE TERRA COTTA COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellee, having worked for the appellant from May 23, 1914, until September 24, 1914 - when he was discharged by the appellant - brought suit claiming that he had a contract of employment with appellant for a full year at the rate of $25., per week, and that there was due him for the unexpired part of that year, the sum of $650. There was a jury trial, a verdict for $200., and judgment entered thereon, from which this appeal is prosecuted.

The appellant contends that (1) no valid contract for any definite period was shown to have existed; (2) that appellee was incompetent and was discharged for cause; (3) that appellee did not use reasonable diligence to obtain employment for the remainder of the alleged term.

(1) There seems to have been ample evidence tending to prove an oral contract of employment from May 23, 1914, until May 23, 1915. The answer of the president of the appellant company to the question put by the appellee as to an

322 - 23667

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The appellant contends that (1) no valid contract for any definite period was shown to have existed; (2) that appellee was incompetent and was discharged for cause; (3) that appellee did not use reasonable diligence to obtain employment for the remainder of the alleged term.

(1) There seems to have been ample evidence tending to prove an oral contract of employment from May 23, 1914, until May 23, 1915. The answer of the president of the appellant company to the question put by the appellee as to an

understanding concerning his employment, "Yes, Jack, starting today we will pay you $25., a week for one year", is sufficient, especially when taken in conjunction with the testimony of the president of the appellant company, that the appellee would be paid $25., a week "for the next year" and the further fact that there is no material evidence to the contrary.

Counsel for appellant claim that "while the testimony shows the intention of the parties to fix the plaintiff's salary at the advanced figure - that is $25.00 per week - it certainly does not show any intention by either of them, at that time, to contract for a year, or any definite length of time." In view of the testimony of both the appellee and the president of the company, we cannot agree with that contention. We are of the opinion that the evidence justified the jury in concluding that there was an oral contract of employment for the period of one year.

(2) As to the right of the appellant to discharge the appellee for incompetency; The evidence shows that the appellee was employed to take charge of the payroll, keep the time, answer correspondence, do certain clerical work, keep track of all the supplies and do certain work outside the factory, and appellant undertook to prove that the appellee in doing his work made a number of errors in figures in the compilation of certain payrolls, eight in number, which errors were made between July 3, 1914 and September 5, 1914; also, that appellee was not sufficiently attentive to his work. That matter, however, was an appropriate subject for the consideration of the jury and, in view of the evidence on that subject, which is unconvincing, we are not inclined to disturb

understanding concerning his employment, "Yes, Jack, start-ing today we will pay you $25., a week for one year", is sufficient, especially when taken in conjunction with the testimony of the president of the appellant company, that the appellee would be paid $25., a week "for the next year" and the further fact that there is no material evidence to the contrary.

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their finding.

(3) As to the diligence of the appellee in obtaining other employment; He testified as to what efforts he made to secure employment and also that he obtained employment on March 3, 1915. There is no evidence denying his statements as to his diligence and no affirmative evidence whatever, on the part of the appellant, on that subject. Fuller v. Little, 61 Ill. 21. The Mount Hope Cemetery Assn. v. Weidenmann, 139 Ill. 67.

By what method of computation the jury arrived at the verdict of $200., of course, we do not know. The evidence of the appellee is to the effect that subsequent to his discharge he sought employment at various places and finally went to work on March 3 (presumably 1915) for the Board of Review, at $100., a month; that he was out of work twenty-two weeks and three days. No evidence was offered by the appellant on that subject. It may be that the jury were of the opinion, from the evidence, that appellee did not exercise reasonable diligence in seeking new employment during the interim, and so fixed the damages at $200. Counsel for appellant contend that as the verdict was $200., it must have been the result of a compromise, and, therefore, should not be allowed to stand. With that conclusion, however, we cannot agree. Although there is considerable disparity between the amount of the verdict and the amount claimed, we do not feel justified in overruling the judgment of the jury.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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(2) As to the diligence of the appellee in obtaining other employment; He testified as to what efforts he made to secure employment and also that he obtained employment on March 3, 1915. There is no evidence denying his statements as to his diligence and no affirmative evidence whatever, on the part of the appellant, on that subject. Miller v. Little, 61 III. 21. The Mount Hope Cemetery Assn. v. Weidenmann, 139 III. 67.

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Finding no error in the record the judgment is affirmed.

AFFIRMED.

234 - 23679

FRANK H. MORGAN, Appellee, vs. ARTHUR G. VIERLING, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The trial court, on February 13, 1917, having entered judgment by confession for $42.50 and $20.00 attorneys' fees, for a month's rental of an apartment, the appellant, on March 12, 1917, moved to vacate the judgment and in support thereof filed two affidavits. That motion was overruled and this appeal taken therefrom. The defense undertaken to be set up by way of affidavits is that appellant was constructively evicted by reason of the failure of appellee to heat the premises as provided for in the lease.

The affidavits show that appellant leased the apartment from the appellee for a term beginning October 1, 1916 and expiring September 30, 1918; that appellant occupied the apartment as a residence for his family, consisting of himself and wife; that the lease, which was in writing, provided "that said lessor shall furnish the heat for the heating apparatus in said building at all reasonable hours of day and evening when necessary, from the 1st of October of each year to the 30th of April of the following year, but it is * * * agreed that the lessor shall not be liable for damages for failure to furnish heat for said

234 - 23679

FRANK H. MORGAN, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
ARTHUR G. VINERLING, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

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apartment as herein agreed and the lessee expressly waives all right or claim for such damages as well as all right to claim an eviction in case the lessor shall be unavoidably delayed in or from furnishing said heat."

The affidavits, as far as they pertain to the defense of a constructive eviction, substantially, recite (1) that the landlord failed to furnish heat at all reasonable hours; (2) that by reason of the failure to heat the premises the lessee's family was unable to continue in occupation of the premises; (3) that they were not supplied with heat as required by the lease; (4) that the lessee sent written complaints of the lack of heat on November 25 and December 14, 1916, January 10, February 1 and February 3, 1917; (5) that after November 25, 1916, there continued to be lack of heat; (6) that for several days prior to December 14, 1916, there was less than 60 degrees of heat in the premises; (7) that on February 1, 1917, they were heated to a less degree than 50 degrees; (8) that on February 3, 4, 5, 6, and 7, 1917, the condition was not remedied, but during all the said time the premises were heated to a less degree of temperature than 50 degrees; (9) that on February 8, 1917, it became unsafe for his wife, who was approaching confinement, to remain longer, owing to the want of heat.

As it is the law, that a failure on the part of a landlord to provide heat as required by the terms of a lease, may constitute a constructive eviction (Lawler v. McNamara, 203 Ill. App. 285) the question in the instant case is, whether the appellee, by his affidavits, has recited such facts, which, if proven, would establish a con-

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As it is the law, that a failure on the part of a landlord to provide heat as required by the terms of a lease, may constitute a constructive eviction (Lawler v. McNamara, 203 Ill. App. 285) the question in the instant case is, whether the appellee, by his affidavits, has recited such facts, which, if proven, would establish a con-

structive eviction for want of heat as provided for in the lease. We are of the opinion that the affidavits, taken together, do set up such facts as constitute a good and meritorious defense. In Levinson v. Pieser (Gen. No. 20169) this court held that a certain affidavit was insufficient on the ground that the material allegations therein were of too general a character, and the following language was used, "Neither the number nor the duration of the different occasions complained of is stated", and, further, that nothing was recited that showed that the "alleged wrongful acts or omissions were not of the most trifling character." In the instant case, however, the recitations of fact are quite explicit - giving both temperature and time - and it is very obvious that if they were true, the premises were not sufficiently heated for residence purposes and as required by the terms of the lease .

As to the contention concerning the words in the lease "the leasee expressly waives all right * * * to claim an eviction in case the lessor shall be unavoidably delayed in and from furnishing said heat", we do not consider that it was necessary for the appellant, in his affidavits, to recite that the appellee was not unavoidably delayed in furnishing heat. In the trial of such a case as this, it is not necessary for the defendant, in making out a prima facie defense of constructive eviction, to negative matters in defeasance of the action, that is, to prove that the landlord was not unavoidably delayed in furnishing heat. The burden of proving the latter would be upon the landlord himself, and, that is because the subject-matter of the negative averment lies peculiarly within the knowledge of

structive eviction for want of heat as provided for in the lease. We are of the opinion that the affidavits, taken together, do set up such facts as constitute a good and meritorious defense. In Levinson v. Pieser (Gen. No. 20189) this court held that a certain affidavit was insufficient on the ground that the material allegations therein were of too general a character, and the following language was used, "Neither the number nor the duration of the different occasion complained of is stated", and, further, that nothing was re-cited that showed that the "alleged wrongful acts or omissions were not of the most trifling character." In the instant case, however, the recitations of fact are quite explicit - giving both temperature and time - and it is very obvious that if they were true, the premises were not sufficiently heated for residence purposes and as required by the terms of the lease .

As to the contention concerning the words in the lease "the lessee expressly waives all right * * * to claim an eviction in case the lessor shall be unavoidably delayed in and from furnishing said heat", we do not consider that it was necessary for the appellant, in his affidavits, to recite that the appellee was not unavoidably delayed in furnishing heat. In the trial of such a case as this, it is not necessary for the defendant, in making out a prima facie defense of constructive eviction, to negative matters in defensive of the action, that is, to prove that the landlord was not unavoidably delayed in furnishing heat. The burden of proving the latter would be upon the landlord himself, and, that is because the subject-matter of the negative averment lies peculiarly within the knowledge of

the landlord himself. Greenleaf, Evid. Vol. 1, Sec. 79; Williams v. The People, 121 Ill. 84; Prentice v. Crane, 234 Ill. 302; Great Western R. R. Co. v. Bacon, 30 Ill. 347.

We are of the opinion that the trial court erred and the judgment should have been vacated and the defendant given an opportunity to put in his defense. The judgment, accordingly, is reversed and the cause remanded.

REVERSED AND REMANDED.

the landlord himself. Greenleaf, Evid. Vol. I, Sec. 75; Williams v. The People, 121Ill. 84; Prentice v. Crane, 224 Ill. 302; Great Western R. R. Co. v. Bacon, 30 Ill. 347.

We are of the opinion that the trial court erred and the judgment should have been vacated and the defendant given an opportunity to put in his defense. The judgment, accordingly, is reversed and the cause remanded.

REVERSED AND REMANDED.

440 - 23785

FRANK H. MORGAN, Appellee, vs. ARTHUR G. VIERLING, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 319

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This appeal involves, in substance, similar facts and principles as were the subject for consideration in Morgan v. Vierling, Gen. No. 23679. Our opinion in the latter case, therefore, is controlling here.

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

440 - 25725

FRANK H. MORGAN,

Appellee,

APPEAL FROM

vs.

MUNICIPAL COURT

ARTHUR G. VINKELING,

OF CHICAGO.

Appellant.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This appeal involves, in substance, similar facts and principles as were the subject for consideration in Morgan v. Vinkeling, Gen. No. 25572. Our opinion in the latter case, therefore, is controlling here.

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

413 - 23758

211 I.A. 323

NANNIE MILES, Appellee	)	
vs.	)	Appeal from
INTERNATIONAL HOTEL COMPANY, Appellant	)	Superior Court Cook County

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellee brought suit against the appellant for the value of a trunk and its contents alleged to be worth $3,000, and which she claimed appellant had accepted for storage as a bailee and had thereafter lost. A trial by jury in the Superior Court resulted in a verdict and judgment against appellant in the sum of $1,097.

The facts in the case - outside of those bearing on appellant's care - are substantially the same as those recited in the case of Miles v. Int. Hotel Co., 167 Ill. App. 440. On November 30, 1904, appellee registered at the hotel of the appellant and was assigned Room 301, with the understanding that she was to pay a special rate of One Dollar per day, or Seven Dollars per week, as she had announced that she would be there for some time. The regular price of the room was $1,50 per day. The property she took with her to the hotel and to her room consisted of a trunk, suit case and bird cage. She occupied the room until May 30, 1905, when, in preparation for leaving, according to her testimony, she called a bell-boy and told him that she was going away and would be gone

413 - 43758

NAMELESS ITEM.	
Appellee	
vs.	
INTERNATIONAL BOTTLE COMPANY.	
Appellant	

Appeal from
Superior Court
Lake County

MR. FRANKLIN CONLIN JAMIE delivered the opinion of the court.

Appellee brought suit against the appellant for the value of a truck and the contents alleged to be worth $3,000, and which he claimed appellant had accepted for storage as a bailee and had thereafter lost. A trial by jury in the superior court resulted in a verdict and judgment against appellant in the sum of $1,027.

The facts in the case - stripped of those peculiar to appellant's case - are similar to those recently reviewed in the case of Illig v. Int. Motel Co., 3 Ill. App. 449. On December 3, 1924, appellee registered at the hotel of the appellant and was assigned room 321, which is [illegible] that she was to pay a special rate [illegible] per day, or seven dollars per week, as she [illegible] would be [illegible] time. [illegible] of the room was $1.50 per day. [illegible] with her to [illegible] her room [illegible] truck, but said [illegible] cage. [illegible] multi-way co., Inc., was, in [illegible] according to her [illegible], she called [illegible] told his [illegible] and [illegible]

some time; and, as she would like to have her trunk taken care of, asked him to ascertain if she could leave her trunk, and what the charges would be, if any, and that he reported that the clerk would take care of the trunk and that there would be no charges. On that day she left the hotel and returned sometime in March, 1906, nearly a year later, and, after registering, requested that her trunk be sent up to her room. The trunk, however, could not be found and was at no time thereafter returned to her.

There was a baggage room in the basement, which was in charge of Murray, the head porter; that room was kept locked and the day porter, the head porter and the night porter had access to it, and no one else save the office men.

In the room which was occupied by the appellee there was posted a "Notice to Guests" which, in part, was as follows: "All baggage of guests left with us in storage will receive our best attention, for which no charge will be made, but in case of accident by fire or water or damage of any kind, it will be at the risk of the owner."

When this cause was in this court before for review we announced that the trial court erred in refusing to admit evidence that "the porter, night-watchman and baggage room keeper employed by it were competent employees and that they were considered by appellant to be competent when they were employed."

It now reappears, after another trial, and the present record shows that considerable evidence was offered tending to overcome the presumption of negligence arising by reason of the prima facie case

some time; and, as she would like to have her trunk taken care of, asked him to ascertain if she could leave her trunk, and what the charges would be, if any, and that he reported that the clerk could take care of the trunk and that there would be no charges. On that day she left the hotel and returned sometime in March, 1906, nearly a year later, and, after registering, requested that her trunk be sent up to her room. The trunk, however, could not be found and was at no time thereafter returned to her.

There was a baggage room in the basement, which was in charge of "porter," and porter; that room was kept locked and the key porter, the head porter and the night porter had access to it, and no one else save the office man.

In the room which was occupied by the appellee there was posted a "notice to guests" which, in part, was as follows: "All baggage of guests left with us in storage will receive the best attention, for which no charge will be made, but in case of accident by fire or robbery or damage of any kind, it will be at the risk of the owner."

When this cause was in this court before for review we pronounced that the trial court erred in refusing to admit evidence that "the porter, night-watchman and baggage room keeper employed by the appellant to be competent when they were employed, were competent employees and that they were considered by appellant to be competent when they were employed."

It now transpires, after another trial, and the present record shows that no material evidence was offered tending to overcome the presumption of negligence arising by reason of the prima facie case

made out by the appellee. It is contended, however, by the latter, that that evidence is insufficient. The particular employees whose employment, character and conduct were of importance were Clark, a day porter; Murray, the head porter; Kemp, night watchman and night porter; and George Carr, a porter. Murray had been employed by the appellant for about three years; Kemp, for two years (but had been with the hotel for ten years before appellant bought it); Carr for two and one-half years. The clerk, Licht, testified that Clark and Murray were very good porters. The evidence concerning the above named employees, their employment and character - which is not controverted - tends to show that appellant used normal business care and judgment in their selection and employment. It also shows that no complaints were ever made with reference to property or baggage entrusted to their care, or in regard to their honesty or competency. Licht, the chief clerk, testified that they never had any complaints of trunks or baggage being lost; and that the number of porters and nightwatchmen was sufficient. Teich, one of the managers, testified that as far as he knew no such trunk was ever left at the appellant's hotel. It was the practice to issue checks for baggage, but the evidence shows appellee had no check for hertrunk. She claimed that the reason she had no check was because she left so hurriedly. She testified, also, that when she left she paid Miss Nelson, the bookkeeper, but the latter said she did not, and Licht, the clerk, testified that he received the money, Twenty-six Dollars, on May 29,1905, and that the entry of it on the cash sheet is in his handwriting.

made out by the appellee. It is contended, however, by the latter, that that evidence is insufficient. The particular employees whose employment, character and conduct were of importance were Clark, a car porter; Murray, the night porter; Leahy, night watchman and night porter; and [illegible], a porter. Murray had been employed by the [illegible] Hotel for about three years; Leahy, for two years (he had been employed [illegible] for ten years before [illegible]); [illegible] two and one-half years. The clerk, [illegible], testified that Clark and Murray were very good porters. The evidence concerning the above named employees, their employment and character - which is not contradicted - tends to show that appellant used proper judicious care and judgment in their selection and employment. It also shows that no complaints were ever [illegible] the propriety of employees' conduct [illegible], or in regard to their honesty or otherwise. Clark, the night clerk, testified [illegible] trunks or baggage [illegible] of patrons [illegible] employment [illegible]. [illegible], one of the [illegible], testified that [illegible] such trunks [illegible]. It was the practice [illegible] checks for baggage, and the evidence [illegible] a check for the trunk. He claimed [illegible] she had [illegible] check [illegible] he left [illegible]. [illegible] testified, also, [illegible] the left [illegible] Lee Nelson, [illegible], but the porter said [illegible], testified that he [illegible], [illegible] stand-standing.

Under the peculiar circumstances of this case, it is difficult to conceive of better proof that appellant used ordinary care, than that which was offered. Of course, according to the law, ordinary care was all that was required. The notice said it "will receive our best attention * * * but in case of * * * damage of any kind, it will be at the risk of the owner." This court said, before, that "best attention" could not mean less than ordinary care and we now say that, under the circumstances of this case, it did not mean more. Counsel for the appellee claimed that it was incumbent upon appellant to show the precise circumstances surrounding the actual loss of the trunk. We are not able to accede to that claim. It is common knowledge that in large hotels, such as the one here involved, many things are lost where the proprietors, who have exercised ordinary care, may have no knowledge whatever of the circumstances surrounding the loss; and to hold them bound to prove facts of which they have no knowledge would be highly unreasonable. Appellant has proved its general practice in regard to handling and keeping baggage and has roved that the particular men who would normally, in the course of their employment, take charge of the trunk, were of good character and fit for their positions, and, as the practice which was followed was an unobjectionable one, and, as the men employed were of good character, and, as there is no evidence to the contrary save the presumption arising from the loss of the trunk, we are of the opinion that the affirmative evidence of the exercise of ordinary care on the part of the appellant is so strong that the verdict must be considered as being manifestly and clearly against the weight

Under the peculiar circumstances of this case, it is difficult to conceive of better proof that appellant used ordinary care, than that which was offered. Of course, according to the law, ordinary care was all that was required. The notice said it "will receive our best attention * * * but in case of * * * damage of any kind, it will be at the risk of the owner." This court said, before, that "best attention" could not mean less than ordinary care and we now say that, under the circumstances of this case, it did not mean more. Counsel for the appellee stated that it was incumbent upon appellant to show that proper diligence enforcing the actual loss of the trunk. We are not able to assent to that claim. It is common knowledge that in large cities, such as it is shown to involved, many things are in a state of disintegration, and even if the circumstances surrounding the loss; and to hold them bound to prove facts of which they have no knowledge would be clearly unreasonable. Appellant has proved its own proper position in regard to handling and keeping baggage and has proved that the porter or man would probably, in the course of the employment, take charge of the trunk, were it in proper condition for their positions, and, as the proximate cause of the loss, was an unobject of the one, and, so far as we can gather, were of good character, and, as there is no evidence to the contrary save the presumption arising from the loss of the trunk, we are of the opinion that the affirmative evidence of the exercise of ordinary care on the part of the appellant is so strong that the verdict must be considered as being carefully and clearly against the weight

of the evidence.

The judgment will be reversed.

REVERSED.

MR. JUSTICE O'CONNOR DISSENTING:

Plaintiff made out a prima facie case, and the burden then was on the defendant to prove by a preponderance of the evidence that it had exercised ordinary care to protect plaintiff's property. The defendant, in my opinion, fell far short of this.

of the evidence.

The judgment will be reversed.

MAYNARD.

MR. JUSTICE O'CONNOR DISSENTING:

Plaintiff made out a prima facie case, and the burden then was on the defendant to prove by a preponderance of the evidence that it had exercised ordinary care to protect plaintiff's property. The defendant, in my opinion, fell far short of this.

269 - 23614

211 I.A. 336

T. ALLEN BEALL,
Appellee,

vs.

T. L. JONES, et al

A. M. EAREL and
A. M. HONEYWELL,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

T. Allen Beall filed his bill of complaint against Thomas L. Jones, Alfred H. Trego, A. M. Earel and A. M. Honeywell, praying for an accounting under a contract entered into between the parties, March 25, 1908, and for the removal of the trustee therein named. It was decreed that the defendants, Trego, Earel and Honeywell pay to the complainant certain specified sums, to reverse which the defendants Earel and Honeywell prosecute this appeal.

It is alleged in the bill that complainant and the defendants Trego, Earel and Jones entered into a written contract March 25, 1908, and that the defendant Honeywell signed the contract the following day. The contract is set up in haec verba. Trego, Earel, Jones and Beall are parties of the first part, and Trego as trustee, is party of the second part. It provides that the parties of the first part will deposit with the trustee 265,000 shares of stock of the St. Helen's Mill, Ore and Power

T. ALLEN BEALL, Appellee, vs. T. L. JONES, et al ——— A. M. BAREL and A. M. HONEYWELL, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE CLODNOCH delivered the opinion of the court.

T. Allen Beall filed his bill of complaint against Thomas L. Jones, Alfred M. Trego, A. M. Barel and A. M. Honeywell, praying for an accounting under a contract entered into between the parties, March 23, 1918, and for the removal of the trustee therein named. It was decreed that the defendants, Trego, Barel and Honeywell pay to the complainant certain specified sums, to reverse which the defendants Barel and Honeywell prosecute this appeal.

It is alleged in the bill that complainant and the defendants Trego, Barel and Jones entered into a written contract March 23, 1918, and that the defendant Honeywell signed the contract the following day. The contract is set up in haec verba. Trego, Barel, Jones and Beall are parties of the first part, and Trego as trustee, is party of the second part. It provides that the parties of the first part will deposit with the trustee 200,000 shares of stock of the St. Helen's Mill, Ore and Power

Company, a corporation organized under the laws of the State of Washington; that the parties will each subscribe and pay to the treasurer to be selected $5,000, less such payments as each of the parties had theretofore made on account of the St. Helen's Company; that Trego had already paid $2,750, Earel $2,500 and Beall $4,510, and in addition they had executed notes in the amount of $8,000 for the payment of which they were jointly liable; that the balance of the $5,000 which each was to pay should be paid at the rate of $500 per month on the 15th of each month; that the stock which was to be deposited under the agreement should be applied by the trustee and treasurer, under the direction of a majority of the beneficiaries, in the promotion of the Pacific Power & Railway Company, another corporation organized under the laws of Washington. It further provided that the trustee should hold the stock and all property and money in trust for the beneficiaries under the agreement; that the stock should be exchanged by the trustee as soon as possible for not less than 400,000 shares of the Pacific Power & Railway Company; that Trego, Earel, Beall and Honeywell should each receive at once 25,000 shares of the stock of the Pacific Power and Railways Company, (Jones being expressly excepted) provided such parties deposited with the trustee an irrevocable power of attorney authorizing him to vote such stock at any meeting; that the remaining 300,000 shares of stock be held by the trustee for the benefit of the present and future beneficiaries; that during the construction of the hydraulic and electric plant by the Pacific Power and Railway Company the trustee should vote all the stock deposited with him for directors of that company to be selected from the beneficiaries only, except that if it

Company, a corporation organized under the laws of the State of Washington; that the parties will each subscribe and pay to the treasurer to be selected $5,000, less such payments as each of the parties had theretofore made on account of the St. Helen's Company; that Trego had already paid $2,750, Karel $2,500 and Beall $4,500, and in addition they had executed notes in the amount of $8,000 for the payment of which they were jointly liable; that the balance of the $5,000 which each was to pay should be paid at the rate of $500 per month on the 15th of each month; that the stock which was to be deposited under the agreement should be applied by the trustee and treasurer, under the direction of a majority of the beneficiaries, in the promotion of the Pacific Power & Railway Company, another corporation organized under the laws of Washington. It further provided that the trustee should hold the stock and all property and money in trust for the beneficiaries under the agreement; that the stock should be exchanged by the trustee as soon as possible for not less than 450,000 shares of the Pacific Power & Railway Company; that Trego, Karel, Beall and Longwell should each receive at once 25,000 shares of the stock of the Pacific Power and Railway Company, (Jones being apparently excepted) provided such parties deposited with the trustee an irrevocable power of attorney authorizing him to vote such stock at any meeting; that the remaining 300,000 shares of stock be held by the trustee for the benefit of the present and future beneficiaries; that during the construction of the hydraulic and electric plant by the Pacific Power and Railway Company the trustee should vote all the stock deposited with him for directors of that company to be selected from the beneficiaries only, except that if it

was necessary to have a director resident in Washington, then such director might be voted for by the trustee. It further provided that new members might be admitted upon condition that they should be elected by a majority of the existing members and should pay $5,000 each; that such new members should contribute and deposit with the trustee sufficient stock of the St. Helen's Company to entitle each to an exchange of 75,000 shares of the Pacific Power & Railway Company, which should be deposited in the same manner; that all profits should be held by the trustee for the benefit of the beneficiaries; that upon completion of the plant the trustee and treasurer should divide all stock, moneys and property amongst the beneficiaries, share and share alike; that the trustee should issue to each party signing the agreement when he had deposited his portion of the stock and paid the money required, a certificate reciting that the party was a beneficiary under the agreement; that such certificate should be issued to new members, "provided that not more than ten members shall be admitted to the benefits of this agreement, except by a three-fourths vote of the previously admitted members."

The bill further avers that all of the parties except Jones, on the next day executed a written agreement which recited the execution of the contract and the payments as therein stated, and provided that interest be allowed on such sums at the rate of seven per cent, until the payments had been equalized. It is further averred that the parties deposited with the trustee 265,000 shares of stock of the St. Helen's Company, of which complainant deposited

was necessary to have a director resident in Washington, then such director might be voted for by the trustee. It further provided that new members might be admitted upon condition that they should be elected by a majority of the existing members and should pay $5,000 each; that such new members should contribute and deposit with the trustee sufficient stock of the St. Helen's Company to entitle each to an exchange of 75,000 shares of the Pacific Power & Railway Company, which should be deposited in the same manner; that all profits should be held by the trustee for the benefit of the beneficiaries; that upon completion of the plant the trustee and treasurer should divide all stock, money and property amongst the beneficiaries, share and share alike; that the trustee should issue to each party signing the agreement when he had deposited his portion of the stock and paid the money required, a certificate recitting that the party was a beneficiary under the agreement; that such certificate should be issued to new members, "provided that not more than ten members shall be admitted to the benefits of this agreement, except by a three-fourths vote of the previously admitted members."

The bill further avers that all of the parties except Jones, on the next day executed a written agreement which recited the execution of the contract and the payments as therein stated, and provided that interest be allowed on such sums at the rate of seven per cent, until the payments had been equalized. It is further averred that the parties deposited with the trustee 225,000 shares of stock of the St. Helen's Company, of which complainant deposited

135,000 shares; that complainant executed the power of attorney as provided in the contract; that complainant paid $490, the balance of his $5,000 to the treasurer; that thereupon it became the duty of the trustee to issue a certificate to complainant, but that the trustee refused to do so; that the parties, except Jones, constituted the directors of the two companies, and that Trego was President; Earel, Treasurer and Honeywell, Secretary; that there was also a director resident in Washington; that it became the duty of the trustee to exchange the stock as provided in the contract, but that through conspiracy with the defendants, Earel and Honeywell, he refused to do so, and refused to issue stock in the Pacific & Railway Company to complainant. It was further averred that it was the duty of the other members to pay in the balance of the $5,000; that since the execution of the contract Jones paid only $1,000, and the other defendants but $300; that there was due from Trego, $2,000; from Earel $2,200; from Honeywell, $4,000, and from Jones, $4,000; that Trego, Earel and Honeywell, being in control of the two companies, conspired to get possession of the stock belonging to complainant without adequate consideration and for that purpose had judgment confessed on one of the notes against complainant for $1,200 and levied upon complainant's stock of the par value of $115,000, which judgment complainant was compelled to pay. The prayer of the bill was for an accounting and that the trustee be removed.

The defendants filed a joint and several answer in which they admit the signing of the contract of March 25,

185,000 shares; that complainant executed the power of attorney as provided in the contract; that complainant paid $400, the balance of his $5,000 to the treasurer; that thereupon it became the duty of the trustee to issue a certificate to complainant, but that the trustee refused to do so; that the parties, except Jones, constituted the directors of the two companies, and that Trego was president; Karel, Treasurer and Honeywell, Secretary; that there was also a director resident in Washington; that it became the duty of the trustee to exchange the stock as provided in the contract, but that through conspiracy with the defendants, Karel and Honeywell, he refused to do so, and refused to issue stock in the Pacific & Railway Company to complainant. It was further averred that it was the duty of the other members to pay in the balance of the $5,000; that since the execution of the contract Jones paid only $1,000, and the other defendants but $500; that there was due from Trego, $2,000; from Karel, $2,500; from Honeywell, $4,000, and from Jones, $4,000; that Trego, Karel and Honeywell, being in control of the two companies, conspired to get possession of the stock belonging to complainant without adequate consideration and for that purpose had judgment confessed on one of the notes against complainant for $1,250 and levied upon complainant's stock of the par value of $110,000, which judgment complainant was compelled to pay. The prayer of the bill was for an accounting and that the trustee be removed.

The defendants filed a joint and several answer in which they admit the signing of the contract of March 25,

1908, but averred that it was not to be effective until and unless it was executed by ten members; that it was the understanding and agreement that there should be $50,000 in the fund, or $5,000 from each of ten members, and that until this was done the contract was not to be effective; that copies of the contract were given to the several parties for the purpose of enabling them to solicit new members; that many persons were solicited to become members without success. Defendants denied that they deposited any stock with the trustee under the contract, or otherwise, but admit that complainant sent his stock to the trustee, which was later returned to him; that owing to the failure to secure ten members to the agreement it was abandoned and no stock was deposited under it, no certificates issued, no exchange of stock made, no trust funds received or paid out; denied that there was any payment made by any of the parties under the contract, but averred that all such payments were made by the several parties without any joint agreement between them; avers that the St. Helen's Company never had any tangible assets; that it claimed some water rights in Washington on the strength of which defendants purchased some stock from complainant; that the rights were afterwards made a part of the United States Forest Reserve, and that on account of failure of the St. Helen's Company and Pacific Power & Railway Company to proceed with their project, the National Government canceled all the rights of the two concerns; denied any conspiracy, or that there was any demand for an accounting, or that complainant is entitled to any relief.

1908, but averred that it was not to be effective until and unless it was executed by ten members; that it was the understanding and agreement that there should be $50,000 in the fund, or $5,000 from each of ten members, and that until this was done the contract was not to be effective; that copies of the contract were given to the several parties for the purpose of enabling them to solicit new members; that many persons were solicited to become members without success. Defendants denied that they deposited any stock with the trustee under the contract, or otherwise, but admit that complainant sent his stock to the trustee, which was later returned to him; that owing to the failure to secure ten members to the agreement it was abandoned and no stock was deposited under it, no certificates issued, no exchange of stock made, no trust funds received or paid out; denied that there was any payment made by any of the parties under the contract, but averred that all such payments were made by the several parties without any joint agreement between them; avers that the St. Helen's Company never has any tangible assets; that it claimed some water rights in Washington on the strength of which defendants purchased some stock from complainant; that the rights were afterwards made a part of the United States Forest reserve, and that on account of failure of the St. Helen's Company and Pacific Power & Railway Company to proceed with their project, the National Government cancelled all the rights of the two concerns; denied any conspiracy, or that there was any demand for an accounting, or that complainant is entitled to any relief.

The cause was referred to a master in chancery who took proofs and made a report. He found that the contract was in force and effect from the date it was executed; that the parties had hoped to secure new members, but were unsuccessful; that a year afterwards, March 26, 1909, the parties abandoned the contract and entered into another of similar import, with a few objectionable features omitted; that the second contract never went into effect; but that there should be an accounting between the parties for advances by them subsequent to the date of the contract, March 25, 1908. The master stated the account between Trego, Karel, Honeywell and complainant, Jones being omitted. The account as stated showed the amounts paid subsequent to the date of the contract as follows: Trego, $2,258.71; Karel, $2,715.52; Honeywell, $3,054.87, and Beall, $1,315. The master found that the total of these payments should be divided between the four, and that Beall should pay $1,021.02,-- $379.50 to Karel and $718.85 to Honeywell. To this report complainant filed ninety objections. They were overruled and ordered to stand as exceptions. An interlocutory decree was entered by the court sustaining some of the exceptions and overruling others, and the master was ordered to restate the account in accordance with the decree. Thereafter the master withdrew the accounting part of his report only, and restated it in accordance with the decree. In this restatement complainant was given credit for the amounts expended by him prior to the date of the contract, as well as afterwards, but the defendants were not given credit for any sum paid prior to the contract, but only that which was paid out subsequent to it. To

The cause was referred to a master in chancery who took proofs and made a report. He found that the contract was in force and effect from the date it was executed; that the parties had hoped to secure new members, but were unsuccessful; that a year afterwards, March 26, 1909, the parties abandoned the contract and entered into another of similar import, with a few objectionable features omitted; that the second contract never went into effect; but that there should be an accounting between the parties for advances by them subsequent to the date of the contract, March 25, 1908. The master stated the account between Trego, Karel, Honeywell and complainant, items being omitted. The account as stated showed the amounts paid subsequent to the date of the contract as follows: Trego, $2,258.71; Karel, $2,718.82; Honeywell, $3,064.87, and Benil, $1,818. The master found that the total of these payments should be divided between the four, and that Benil should pay $1,021.02,-- $279.50 to Karel and $718.85 to Honeywell. To this report complainant filed ninety objections. They were overruled and ordered to stand as exceptions. An interlocutory decree was entered by the court sustaining some of the exceptions and overruling others, and the master was ordered to restate the account in accordance with the decree. Thereafter the master withdrew the accounting part of his report only, and restated it in accordance with the decree. In this restatement complainant was given credit for the amounts expended by him prior to the date of the contract, as well as afterwards, but the defendants were not given credit for any sum paid prior to the contract, but only that which was paid out subsequent to it. To

this supplemental report defendants filed objections. They were overruled and ordered to stand as exceptions which were likewise overruled and a decree entered. The master in his supplementalreport stated: "I understand the said order of the Court to direct the Master to make the computation stated above and not consider the merits of the case."

The decree is manifestly unjust and inequitable; in fact, it is not sought to be defended in this court on either of these grounds. There can be no equitable reason why complainant in the accounting should be allowed for the amount he had expended prior to the execution of the contract and the defendants Tregoy and Earelnot be given credit for the amount expended by them prior to the contract. In fact, it is not even suggested by counsel for complainant, nor could it well be, that the decree is just or equitable. It is sought to be justified apparently only on the ground that no objection was filed by defendants to the masters report that such credit was not given them in the first account. As the master's first report did not take into account any money expended prior to the contract, and as the result was in favor of the defendants and against complainant, there was no need to file objections, and it was only after the master gave credit, as he was directed, to complainant and did not give credit to defendants for the amounts expended prior to the contract, that they had an opportunity to file objections. It appears from the evidence that the St. Helen's Company was incorporated for $1,000,000, and the Pacific Power & Railway Company for $2,000,000; that neither of them had any assets, except a tentative claim for some prospective

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water power, which claim was afterwards canceled by the National Government; that the expenditure of money prior to the contract was made by the three parties on behalf of the St. Helen's Company, and whatever claim these three parties had was against the St. Helen's Company, and neither had a claim for such expenditures against the other; that moneys expended subsequent to the date of the contract was expended by the several parties on behalf of the two corporations, and that neither of the parties would have a claim against any other of the parties, unless by virtue of the contract. Earel, Trego, Honeywell, Jones and Sturtevant, all testified that prior to and at the time of the execution of the first contract, it was expressly understood and agreed that the contract should not become effective and binding, until and unless ten persons were secured who would join in the contract. This is denied by complainant, who testified that no such statement was made, but that it was understood by all of the parties that the contract would be effective as stated by its terms upon its delivery. It is conceded by all parties that the second contract, which was signed by all parties to this litigation, did not become effective, and was not to become effective until at least ten members had executed it. The two contracts are almost identical, except that two provisions of the first contract with reference to the exchange of the stock of the two companies and the voting by the trustee under his power of attorney for certain individuals were eliminated from the second contract. The provisions in each contract in reference to obtaining members are substantially the same. There is other evidence in the record that tends to support defendants' theory that the contract was not in-

water power, which claim was afterwards cancelled by the National Government; that the expenditure of money prior to the contract was made by the three parties on behalf of the St. Helen's Company, and whatever claim these three parties had was against the St. Helen's Company, and neither had a claim for such expenditures against the other; that moneys expended subsequent to the date of the contract was expended by the several parties on behalf of the two corporations, and that neither of the parties would have a claim against any other of the parties, unless by virtue of the contract. Karel, Trego, Donywell, Jones and Sturtevant, all testified that prior to and at the time of the execution of the first contract, it was expressly understood and agreed that the contract should not become effective and binding, until and unless ten persons were secured who would join in the contract. This is denied by complainant, who testified that no such statement was made, but that it was understood by all of the parties that the contract would be effective as stated by its terms upon its delivery. It is conceded by all parties that the second contract, which was signed by all parties to this litigation, did not become effective, and was not to become effective until at least ten members had executed it. The two contracts are almost identical, except that two provisions of the first contract with reference to the exchange of stock of the twocompanies and the voting by the trustee under his power of attorney for certain individuals were eliminated from the second contract. The provisions in each contract in reference to obtaining members are substantially the same. There is other evidence in the record that tends to support defendants' theory that the contract was not in-

tended to be effective until additional parties had been secured. The complainant Beall and the defendants, Earel, Trego and Honeywell are related to each other, while Jones and Sturtevant are not. We think it clear that it was not the intention that Jones should be held under the contract, for it appears that the day after it was signed the other parties to it provided for the payment of interest on the sums that had theretofore been paid. This agreement was not signed by Jones, and there is other evidence in the case that clearly shows that Jones was not considered as being bound. After a most careful consideration of all the evidence in the record, we are of the opinion that the finding of the master that the contract was to be in full force and effect from its date is not sustained, but that such finding is manifestly against the weight of the evidence. Whether a contract is delivered so as to become a binding obligation is a question of intent. We hold that the intention of the parties was that it should not be binding until additional persons had executed it; that as there was a failure in this regard, the contract never was in force and effect. Other allegations of the bill were in no manner proved by the evidence. Complainant's entire case and his right to recover is based upon the contract, and the finding of the master and the decree can only be sustained on the theory that the contract became effective at the time it was executed, although thereafter abandoned, and since we have held that the contract was never in effect, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to dismiss the bill for want of equity. As this is a chancery proceeding we can apportion the costs. We think the costs in this and

tended to be effective until additional parties had been secured. The complainant Beall and the defendants Harol, Trego and Honeywell are related to each other, while Jones and Sturtevant are not. We think it clear that it was not the intention that Jones should be held under the contract, for it appears that the day after it was signed the other parties to it provided for the payment of interest on the sums that had therefore been paid. This agreement was not signed by Jones, and there is other evidence in the case that clearly shows that Jones was not considered as being bound. After a most careful consideration of all the evidence in the record, we are of the opinion that the finding of the master that the contract was to be in full force and effect from its date is not sustained, but that such finding is manifestly against the weight of the evidence. Whether a contract is delivered so as to become a binding obligation is a question of intent. We hold that the intention of the parties was that it should not be binding until additional persons had executed it; that as there was a failure in this regard, the contract never was in force and effect. Other allegations of the bill were in no manner proved by the evidence. Complainant's entire case and his right to recover is based upon the contract, and the finding of the master and the decree can only be sustained on the theory that the contract became effective at the time it was executed, although thereafter abandoned, and since we have held that the contract was never in effect, the decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to dismiss the bill for want of equity. As this is a chancery proceeding we can

the trial court should be equally apportioned between the complainant and the defendants Trego, Earel and Honeywell, each paying one-fourth thereof, and it is so ordered.

REVERSED AND REMANDED
WITH DIRECTIONS.

the total costs should be equally apportioned between the complainant and the defendants Trego, Xavel and Honeywell, each paying one-fourth thereof, and it is so ordered.

ENTERED AS OF FEBRUARY
11TH THEREON.

341 - 23686

ANTON J. CERMAK, Bailiff etc.,
for use of Robert Eckhardt,

Appellees,

vs.

CHICAGO BONDING & SURETY COMPANY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 337

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a replevin bond. The case was tried before the court without a jury; there was a finding and judgment in favor of plaintiff for $95.91, to reverse which defendant prosecutes this appeal.

The facts are agreed, and the only point urged for reversal is that the judgment entered in the replevin suit in which the bond was given was insufficient to support an action on the bond. The judgment is as follows:

> "The court finds the right of possession of property in the plaintiff in replevin, but held by the defendant for the payment of $34.71. It is therefore ordered that judgment on finding be entered in the alternative; that plaintiff pay the defendant $34.71 in twenty days, or that a writ of retorno habendo issue for the property replevied, costs adjudged against the plaintiff."

The argument is that this judgment is insufficient because it finds the right of possession of the property in plaintiff instead of the defendant. Section 22 of the replevin act provides that "if the property

341 - 35686

ANTON J. CERMAK, Sheriff etc., for use of Robert Eckhardt, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
CHICAGO BONDING & SURETY COMPANY, Appellant.	

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit brought on a replevin bond. The case was tried before the court without a jury; there was a finding and judgment in favor of plaintiff for $35.21, to reverse which defendant prosecutes this appeal.

The facts are agreed, and the only point urged for reversal is that the judgment entered in the replevin suit in which the bond was given was insufficient to support an action on the bond. The judgment is as follows:

> "The court finds the right of possession of property in the plaintiff in replevin, but hold by the defendant for the payment of $34.71. It is therefore ordered that judgment on finding be entered in the alternative; that plaintiff pay the defendant $34.71 in twenty days, or that a writ of return habendo issue for the property replevied, costs adjudged against the plaintiff."

The argument is that the judgment is insufficient because it finds the right of possession of the property in plaintiff instead of the defendant. Section 22 of the replevin act provides that "if the property

was held for the payment of any money the judgment may be in the alternative that plaintiff pay the amount for which the same was rightfully held with proper damages within a given time, or make return of the property." While the judgment of the court might be better expressed than it is, yet we think it is a sufficient compliance with section 22. It in effect holds that the property was held by the defendant in replevin for the payment of money, and it was ordered that unless the amount for which is was so held be paid within twenty days, the property be returned. This is all that the statute requires, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

was held for the payment of any money the judgment may be in the alternative that plaintiff pay the amount for which the same was rightfully held with proper damages within a given time, or make return of the property."

While the judgment of the court might be better expressed than it is, yet we think it is a sufficient compliance with section 24. It is effect holds that the property was held by the defendant in replevin for the payment of money, and it was ordered that unless the amount for which is was so held be paid within twenty days, the property be returned. This is all that the statute requires, and the judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

390 - 23735

THEODORE F. BRINCKMANN,
Appellant.

vs.

REUBEN H. DONNELLEY,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This appeal involves the other member of the same firm that is involved in the case of Vondrak v. Donnelley, Gen. No. 23734. The facts being identical, the opinion filed this day in the Vondrak case is controlling here.

The judgment of the Circuit Court of Cook County is therefore affirmed.

AFFIRMED.

THEODORE F. BRINCKMANN,
Appellant.

vs.

REUBEN H. DONNELLEY,
Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This appeal involves the other member of the same firm that is involved in the case of Vondrak v. Donnelley, Gen. No. 25724. The facts being identical, the opinion filed this day in the Vondrak case is controlling here.

The judgment of the Circuit Court of Cook County is therefore affirmed.

AFFIRM'D.

250 - 23595

211 I.A. 355

AUTO UTILITIES MANUFACTURING COMPANY, a corporation, Appellee, vs. U. S. BLOW PIPE and DUST COLLECTING COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The Auto Utilities Manufacturing Company, appellee, hereinafter referred to as the plaintiff, brought this action in the Municipal Court of Chicago against the U. S. Blow Pipe and Dust Collecting Company, hereinafter referred to as the defendant, claiming a commission on a contract entered into between the defendant and the National Malleable Casting Company. The plaintiff recovered a judgment amounting to $120.75, from which the defendant has appealed.

The plaintiff was engaged in installing certain ventilators and stacks in the plant of the Malleable Casting Company as a part of a ventilating system. There were some hoods needed in connection with this work. Mr. Becker of the plaintiff company conferred with Mr. Hahn of the defendant company, and asked him to figure on these hoods and submit his bid to the Malleable Casting Company. Becker says he told Hahn, "in figuring the job, to figure five per cent for me in compensation for what I had done on the job.

250 - 25895

AUTO UTILITIES MANUFACTURING COMPANY, a corporation, Appellee, vs. U. S. BLOW PIPE and DUST COLLECTING COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTIC[illegible] THOMPSON delivered the opinion of the court.

The Auto Utilities Manufacturing Company, appellee, hereinafter referred to as the plaintiff, brought this action in the municipal court of Chicago against the U. S. Blow Pipe and Dust Collecting Company, hereinafter referred to as the defendant, claiming a commission on a contract entered into between the defendant and the National Allowable Casting Company. The plaintiff recovered a judgment amounting to $1420.75, from which the defendant has appealed.

The plaintiff was engaged in installing certain ventilators and stacks in the plant of the Allowable Casting Company as a part of a ventilating system. There were some hoods needed in connection with this work. Mr. Decker of the plaintiff company conferred with Mr. Hahn of the defendant company, and asked him to figure on these hoods and submit his bid to the Allowable Casting Company. Decker says he told Hahn, "in figuring the job, to figure five per cent for me in compensation for what I had done on the job.

He said he would." The defendant company ultimately closed the contract with the Malleable Casting Company covering the hoods in question, the amount involved being $2415.00. The plaintiff's claim is based on five per cent of that amount, which is $120.75. The nature of the plaintiff's claim is best expressed in the language used by them in a letter addressed to the defendant under date of May 4, 1917, in which we find this language: "this company furnished its services to you in securing an order amounting to $2600.00 or $2700.00 from the Malleable Casting Company and the agreed commission to be paid us by their Mr. Hahn was five per cent."

The defendant urges that the judgment should be reversed because the making of any contract involving services, on its part to secure an order or contract for the defendant in consideration of the payment of a commission to it by the defendant, was a matter beyond the scope of the business of the plaintiff as defined in its charter and therefore ultra vires. It appears from the record that the corporate powers of the plaintiff as authorized by its charter were "to manufacture, buy, sell, use, and deal in automobile specialties; to manufacture, buy, sell, use, and deal in and with, machines, goods, wares, and merchandise of all kinds; to purchase, sell, lease and deal in inventions, patents, and processes, and in connection with its business of manufacturing, buying, selling, using, dealing in and with machines, goods,wares, and merchandise, patents, inventions, and processes, to construct, build, lease, own, and operate all necessary factories, shops, buildings and plants,"

He said he would." The defendant company ultimately closed the contract with the Malleable Casting Company covering the goods in question, the amount involved being $2413.00. The plaintiff's claim is based on five per cent of that amount, which is $120.75. The nature of the plaintiff's claim is best expressed in the language used by them in a letter addressed to the defendant under date of May 4, 1917, in which we find this language: "This company furnished its services to you in securing an order amounting to $5000.00 or $2700.00 from the Malleable Casting Company and the agreed commission to be paid us by their Mr. Kahn was five per cent."

The defendant urges that the judgment should be reversed because the making of any contract involving services, on its part to secure an order or contract for the defendant in consideration of the payment of a commission to it by the defendant, was a matter beyond the scope of the business of the plaintiff as defined in its charter and therefore *ultra vires*. It appears from the record that the corporate powers of the plaintiff as authorized by its charter were "to manufacture, buy, sell, use, and deal in automobile specialties; to manufacture, buy, sell, use, and deal in and with, machines, goods, wares, and merchandise of all kinds; to purchase, sell, lease and deal in inventions, patents, and processes, and in connection with its business of manufacturing, buying, selling, using, dealing in and with machines, goods, wares, and merchandise, patents, inventions, and processes, to construct, build, lease, own, and operate all necessary factories, shops, buildings and plants."

In meeting this contention advanced by the defendant, the plaintiff argues that it was within its charter powers to install the ventilating system in question, nor would it have been beyond its charter powers if it had installed the hoods used in connection with that system, and that if the plaintiff had the right to install the ventilating system, then as incidental to such power, it had the right to sublet any part of the work. This, no doubt, is true, but it fails to meet the defendant's contention. The plaintiff did not sublet the contract for the hoods, but the defendant made an independent contract direct with the National Malleable Casting Company to furnish the hoods, and the plaintiff's claim, as distinctly stated in their letter from which we have quoted is that they are claiming a commission for services rendered in procuring that contract for the defendant, and that is the theory of the statement of claim filed herein. In our opinion, the charter the powers of the ~~plaintiff as we have quoted them~~ corporation, are not such as to permit it to collect commissions for services rendered in procuring contracts for others, even though those contracts, involve such a subject-matter as would bring the contract within the ~~plaintiff's~~ corporations charter powers if it was making the contract itself, and even though the contract on which the commission is claimed, has been made in conjunction with and incident to, a separate and distinct contract had by the ~~plaintiff~~ corporation with the same party with which the other contract has been made.

We do not deem it necessary to discuss the other points urged by the appellant. For the reasons given, the judgment of the Municipal Court will be reversed.

REVERSED.

In meeting this contention advanced by the defendant, the plaintiff argues that it was within its charter powers to install the ventilating system in question, nor would it have been beyond its charter powers if it had installed the hoods used in connection with that system, and that if the plaintiff had the right to install the ventilating system, then as incidental to such power, it had the right to sublet any part of the work. This, no doubt, is true, but it fails to meet the defendant's contention. The plaintiff did not sublet the contract for the hoods, but the defendant made an independent contract direct with the National Malleable Casting Company to furnish the hoods, and the plaintiff's claim, as distinctly stated in their letter from which we have quoted is that they are claiming a commission for services rendered in procuring that contract for the defendant, and that is the theory of the statement of claim filed herein. In our opinion, the charter powers of the plaintiff as we have quoted them, are not such as to permit it to collect commissions for services rendered in procuring contracts for others, even though these contracts, involving such a subject-matter as would bring the contract within the plaintiff's charter powers if it was making the contract itself, and even though the contract on which the commission is claimed, has been made in conjunction with and incident to, a separate and distinct contract had by the plaintiff with the same party with which the other contract has been made.

We do not deem it necessary to discuss the other points urged by the appellant. For the reasons given, the judgment of the Municipal Court will be reversed.

H. A. MACD.

PAUL BRAUTIGAN, Administrator of the Estate of Franklin Brautigan, deceased,
Appellee,

vs.

UNION OVERALL LAUNDRY AND SUPPLY COMPANY, a Corporation,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

211 I.A. 353

MR. JUSTICE THOMSON delivered the opinion of the court.

In this action, the plaintiff, Paul Brautigan, administrator of the estate of Franklin Brautigan, deceased, recovered a judgment against the defendant, Union Overall Laundry and Supply Company, a corporation, for the sum of $3,000.00, from which the defendant has appealed. The action was based upon the alleged negligence of an employee of the defendant in driving an automobile truck and striking deceased, knocking him down, and inflicting injuries from which he died.

The deceased and his sons were engaged with others in work involving the laying of water mains by the City of Chicago, in 48th Avenue. Late in the afternoon of July 3, 1914 when they quit work, Daniel Brautigan, the son of the deceased, aged about thirteen years, was driving a team of horses and two dump wagons, one hitched behind the other, north in 48th Avenue. There was a double street car track in that street which was paved with stone blocks. The water pipes were being laid in the east road-way, the west road-way which had never been paved, seems to have been usuable, although the evidence on that point is conflicting. Daniel was driving in the north-bound track, and his father, the deceased, was following on foot just behind the rear wagon. There was a shanty on the west side of 48th Avenue at the south side of Wrightwood Avenue. When about one hundred feet south of that shanty, Daniel started to pull over toward it, and as he had his team diagonally across the south-bound track, he saw

an automobile truck coming down from the north in the south-bound track. He slowed up his team. The truck swung over into the east, or north-bound track, whereupon Daniel hurried up his team so that his wagons would be clear of the path the automobile had taken. The truck was running, apparently, with left wheels between the two rails of the north-bound track, and right wheels between the two tracks, as it passed close to the rear of the rear wagon. It appears from the testimony that the right front corner of the truck caught the deceased and knocked him down. When the truck stopped, the plaintiff's witnesses say the deceased was lying about twenty-five feet behind it, and the defendant's witnesses say this distance was not over seven or eight feet. There was much conflict in the evidence as to the speed of the truck. The plaintiff's witnesses put it at twenty to twenty-five miles an hour, but most of them are shown to have testified at the coroner's inquest, the day after the accident, and to have stated at that time that it was traveling "pretty fast" or at "good speed," and to have said they could not give the speed in miles per hour. There was a back-filling apparatus working on the ditch about three hundered feet north of the point where the deceased was struck. In connection with this, there was a cable extending across the tracks. The man operating this apparatus, testified that he put his foot on the cable to hold it down as the truck passed, that it was coming full speed, and that he yelled at the chauffeur as he passed, to slow down. The chauffeur testified that he was not going over ten or twelve miles an hour at this point, and that when he struck deceased, he was not going over four or five miles per hour. He further testified that he first saw the deceased when thirty or thirty-five feet away from him. Later, he testified that he could stop his truck in three or four feet when going ten or twelve miles per hour. He also

an automobile truck coming down from the north in the south-bound track. He slowed up his train. The truck came over into the east, or north-bound track, whereupon [illegible] hurried up his train so that his engine would be alongside of the truck the automobile had taken. The truck was running [illegible], with left wheels between the two rails of the north-bound track, and right wheels between the two tracks, as it passed along on the rear of the rear engine. It appears from the testimony that the right front corner of the truck struck the dashboard and knocked him down. When the truck stopped, the plaintiff's witness say the defendant was lying about twenty-five feet behind it, and the defendant's witnesses say his dismount was not over ten or eight feet. There was much conflict in the evidence as to the speed of the train. The plaintiff's witnesses put it at twenty or twenty-five miles an hour, but most of them are shown to have formulated the opinion's testimony. The fireman's testimony put it at [illegible], and to have stated at that time that he was throwing "pretty fast" on as "good speed," and to have [illegible] and that the speed in going per hour. There was a back-fire [illegible] ing on the fireman's side [illegible] indicated that [illegible] where the [illegible] there was a cable attaching [illegible] engineer [illegible] cable to hold it [illegible] full speed, and that [illegible] to slow down. The [illegible] over ten or twelve miles [illegible] in street [illegible] per hour. The fireman testified that [illegible] caused him dizziness [illegible] station, he testified that [illegible] four feet [illegible] the [illegible]

says he applied his brakes as soon as he saw deceased but that the pavement was wet and he skidded. All the testimony given by the plaintiff's witness was to the effect that the pavement was dry. Based on the defendant's evidence that the deceased was lying seven or eight feet behind the truck when it stopped, the truck covered a distance of thirty-eight to forty-three feet plus the length of the truck, from the time the brakes were applied until it came to a stop. On the defendant's own evidence, therefore, the truck must have been going very fast, whether the pavement be taken as wet or dry. The chauffeur further testified that the wagons obstructed his view of the deceased until he was within thirty or thirty-five feet of him. No horn was blown or other signal given. When the deceased came in view, one Robinson, riding with the chauffeur, called loudly, but the warning was not in time to save him. When the chauffeur undertook to pass close to these wagons on the left, or wrong side, it became his duty to exercise far more care than he did in doing so, and this without regard to the condition of the west roadway. We find no evidence in the record justifying defendant's contention that the deceased was guilty of contributory negligence. Defendant seems to contend that Daniel was negligent in driving over on to the south-bound track when the truck was approaching on that track from the north. In our opinion, the evidence does not disclose such a situation as would make that action on his part, negligence, and even if it did, that negligence could not be charged to the deceased. The verdict is supported by the evidence.

The defendant urges a number of alleged errors in regard to the admission of evidence. Most of these rulings were correct. A few of them might be considered erroneous, but they were on trivial matters which in no way prejudiced the defendant's case. They are not important enough to refer

have he applied his brakes as soon as he saw deceased but that the pavement was wet and he skidded. All the testimony given by the plaintiff's witness was to the effect that the pavement was dry. Based on the defendant's evidence that the deceased was lying some or eight feet behind the truck when it stopped, the trial court found a distance of thirty-eight to forty-three feet plus the length of the truck, from the time the brakes were applied until it came to a stop. On the defendant's own evidence, therefore, the truck must have been going very fast, whether the pavement be taken as wet or dry. The circuit court further testified that the course constituted the view of the deceased until he was within thirty or thirty-five feet of him. No hour was given or other signal given. When the deceased came in view, one John [illegible] riding with the chauffeur, [illegible] locally, but the chauffeur [illegible] to slow to have him. When the chauffeur [illegible] to come close to those wagons on the left, on [illegible] side, it became his duty to [illegible] [illegible] to [illegible] no, but with without regard to the condition of the [illegible] roadway. The trial no evidence in the record justifying defendant's contention that the deceased [illegible] negligence contributory negligence. Defendant [illegible] to [illegible] that [illegible] negligence in driving over on to the south-bound track when the truck was approaching so that [illegible] the [illegible]. In our opinion, the evidence does not [illegible] and [illegible] that action on his part, [illegible], and [illegible], that negligence could not be imputed to the deceased. The verdict is supported by the evidence.

The defendant [illegible] a number of [illegible] errors in regard to the [illegible] and [illegible]. But [illegible] these rulings were correct. [illegible] of [illegible] in [illegible] [illegible], but they were [illegible] [illegible] the defendant's case. They are not [illegible] enough to [illegible]

to here.

It is further alleged by the defendant that the court erred in giving the following instruction:

> "You are further instructed that in an action brought to recover damages either to the person or property caused by running an automobile propelled by mechanical power along a public street through a residential portion of an incorporated city at a greater rate of speed than fifteen miles an hour, the plaintiff is deemed to have made out a prima facie case of negligence by showing the fact that the deceased was killed by said automobile and that the person running such automobile was at the time of the injury running the same at a rate of speed greater than the law permits."

This was a good instruction (Kessler vs. Washburn 157 Ill. App. 532; Ward vs. Meredith 220 Ill. 66; Hartje vs. Moxley 235 Ill. 164) and the court did not err in giving it unless the evidence failed to show that the place of the accident was within an incorporated city and in a residence district. Although it might be said that what little evidence there was on that point, hardly supported the contention that it was a residence district, in which case, the instruction should not have been given, the error was in no way prejudicial to the defendant. The instruction merely told the jury that under given circumstance the plaintiff would be deemed to have made out a prima facie case of negligence. Assuming that the given circumstances in fact were not present, it remains that the evidence did make out, in other respects, a prima facie case of negligence and more.

The defendant further complains of the following instruction:

> " The court instructs the jury that if you believe from the evidence that Franklin Brautigan while in the exercise of ordinary care for his safety and without fault or negligence on his part lost his life by and through the negligence of the defendant, as charged in the declaration or in either count thereof, as amended, and that said Franklin Brautigan left him surviving next of kin, then you should find the defendant guilty and assess the plaintiff's damages at such sum as you believe from the evidence will be fair and just compensation based upon the pecuniary loss, if any,

to here.

It is further alleged by the defendant that the court erred in giving the following instructions:

> "You are further instructed that if in an action brought to recover damages for injuries sustained by a person by reason of being struck by an automobile propelled by mechanical power along a public street through a negligent portion of an improvement, [illegible] of [illegible] within an hour, the plaintiff is deemed to have made out a prima facie case [illegible] by showing the fact that the defendant was [illegible] by such a [illegible] that the person [illegible] such automobile and at the time of the injury [illegible] of a [illegible] of equal greater than the [illegible]."

This was a [illegible] instruction in Lemley vs. Gaughnee 167 Ill. App. 447; Ward vs. Donelle 167 Ill. [illegible]; Hartle vs. Gaylord 247 Ill. 104) and [illegible] the evidence [illegible] Although it might be [illegible] on that [illegible] it was a [illegible] District. [illegible] have been given [illegible] defendant. [illegible] given [illegible] made out [illegible] the given [illegible] that [illegible] Hartle case [illegible]

The defendant [illegible] instructed:

> "[illegible] believe from [illegible] that [illegible] will [illegible] motor [illegible] or on [illegible] in the [illegible] defendant, [illegible] defendant [illegible] Franklin Brewing Co. [illegible] answer the plaintiff's [illegible] believe from [illegible] compensation [illegible]

> resulting from the death of the said Franklin Brautigan to his said next of kin, not exceeding the sum of ten thousand ($10,000) dollars."

It would have been more accurate if this instruction had included the phrase "and under the instructions of the court" but this omission cannot be considered reversible error. Similar instructions have been approved by our Supreme Court. C. B. & Q. R. R. Co. vs. Payne, Administrator 59 Ill. 541; I. & St. L. R. R. Co. vs. Estes 96 Ill. 470; Calumet Street Ry. Co. vs. Van Pelt 173 Ill. 70, in the latter case, the court said, at page 73, in answer to the contention that the instruction was erroneous in that the suggestion to the jury that if they found the appellant guilty they should assess damages not exceeding the sum claimed in the declaration, "the law limits the liability of the defendant in such case, and in all cases the recovery is limited to the amount of the ad damnum of the declaration, and it can not be error to so advise a jury unless the language employed be such as to suggest or imply that the jury should or would be authorized to assess the full amount of the damage claimed in the declaration or permitted by law to be recovered in the case. This instruction does not offend in that respect * * * * * " Moreover, the judgment here is not large and apparently the defendant was in no way injured by the instruction in question.

It is also contended that the trial court erred in giving the following instruction:

> "The court instructs the jury that a driver of an automobile while using the highway must use reasonable care to avoid injury to others."

This was a proper instruction in view of the evidence in the record and when considered in connection with the other instructions given by the court. It did not direct a verdict and therefore excluded no element necessary for the plaintiff to prove in order to recover, nor did it eliminate such defenses as the defendant was urging.

resulting from the death of the said Franklin Brautigam to his said next of kin, not exceeding the sum of ten thousand ($10,000) dollars."

It would have been more accurate if this instruction had included the phrase "and under the instructions of the court" but this omission would not constitute reversible error. Similar instructions have been approved by our Supreme Court. [illegible] v. [illegible], Administrator 40 Ill. [illegible]; [illegible] Co. v. [illegible] 94 Ill. [illegible]; Calumet Street Ry. Co. v. [illegible] 179 Ill. [illegible]. In the latter case, the court said, at page [illegible], [illegible] that the instruction was erroneous in that the reference to the jury [illegible] could find the defendant guilty and award damages not exceeding the sum claimed in the declaration. "The law limits the liability of the defendant in such case, and [illegible] recovery [illegible] amount of the ad damnum of the declaration, and it [illegible] so as to advise a jury [illegible] so as to suggest or imply that the jury would [illegible] to assess the full [illegible] damages alleged in the declaration or [illegible]. This instruction [illegible]. Moreover, the [illegible] defendant [illegible].

[illegible] giving the following [illegible]:

"[illegible]"

[illegible] in the record [illegible] instructions [illegible] and therefore [illegible] to prove in order to recover, [illegible] on the defendant was wanting.

The defendant also assigns as error, the refusal of the court to give the jury an instruction which it submitted. The substance of this instruction was embraced in other instructions which the court did give.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

280 - 23625

HARRY HOMEWOOD,
Appellee,

vs.

MYER J. STEIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 359

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment by confession entered in the Municipal Court of Chicago in an action brought by Harry Homewood, the plaintiff, on a lease in which he was the lessor, and the defendant, Myer J. Stein, was the lessee. By the terms of the lease, the lessor leased an apartment for the term beginning October 1, 1912 and ending September 30, 1913, at a rental of $36.50. The lease contained the following clause: "the lessee hereby constitutes and appoints any attorney of any court of record to be his true and lawful attorney for him and in his name and stead to enter his appearance in any and every suit that may be brought in any of the courts of record in the State of Illinois, and also in any and every suit that may be brought in any court of record in any of the States of the United States of America at any time, and from time to time, whether in term or vacation, when any money is due hereunder for rent asaforesaid, to waive service of process and also the issue of process, and to waive trial, and to

580 - 25626

HARRY HOMEWOOD,

Appellee,

vs.

MYER J. STEIN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

SILLABUS

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment by confession entered in the Municipal Court of Chicago in an action brought by Harry Homewood, the plaintiff, on a lease in which he was the lessor, and the defendant, Myer J. Stein, was the lessee. By the terms of the lease, the lessor leased an apartment for the term beginning October 1, 1912 and ending September 30, 1913, at a rental of $36.50. The lease contained the following clause: "the lessee hereby constitutes and appoints any attorney of any court of record to be his true and lawful attorney for him and in his name and stead to enter his appearance in any and every suit that may be brought in any of the courts of record in the State of Illinois, and also in any and every suit that may be brought in any court of record in any of the states of the United States of America at any time, and from time to time, whether in term or vacation, when any money is due hereunder for rent aforesaid, to waive service of process and also the issue of process, and to waive trial, and to

confess judgment for such money so due, and for costs of suit and for twenty-five dollars attorney's fees in favor of the said lessor or any subsequent legal holder or holders of the rights of the lessor under this lease and to release all errors that may occur or intervene in such proceedings, and to stipulate that no writ of error or appeal shall be prosecuted from such judgment, nor any bill in equity filed, nor any proceeding of any kind taken at law, nor any equity to interfere in any way with the collection of such judgment and to consent that execution may issue thereon immediately; and also to file a cognovit for such money, costs, and fees with an agreement therein waiving, releasing and stipulating as aforesaid." This action was begun by the filing of statement of claim and cognovit, March 16, 1917. George C. Otto appearing as attorney for the plaintiff. In the cognovit, Charles O. Shervey appears as the defendant's attorney. The statement of claim was for a month's rent amounting to $36.50, the month in question being the last one of the term. Judgment was entered for that amount and $25.00 attorney's fees, making a total of $61.50. On March 24, the defendant entered his appearance and prayed an appeal to this court, which was allowed.

In urging a reversal of the judgment, the defendant refers to certain alleged facts which are not shown by the record and which we, therefore, can not take into consideration. In the brief filed, the defendant concedes that our courts have held valid under Section 83, Chapter 69 of the Illinois statutes, a power or warrant of attorney to confess judgment for accruing unpaid rent. That is just what this power of attorney here involved is, and

confess judgment for such money so due, and for costs of suit and for twenty-five dollars attorney's fees in favor of the said lessor or any subsequent legal holder or holders of the rights of the lessor under this lease and to release all errors that may occur or intervene in such proceedings, and to stipulate that no writ of error or appeal shall be prosecuted from such judgment, nor any bill in equity filed, nor any proceeding of any kind taken at law, nor any equity to interfere in any way with the collection of such judgment and to consent that execution may issue thereon immediately; and also to file a cognovit for such money, costs, and fees with an agreement therein waiving, releasing and stipulating as aforesaid." This action was begun by the filing of statement of claim and cognovit, March 16, 1917. George O. Otto appearing as attorney for the plaintiff. In the cognovit, Charles O. Sherrey appears as the defendant's attorney. The statement of claim was for a month's rent amounting to $36.50, the month in question being the last one of the term. Judgment was entered for that amount and $25.00 attorney's fees, making a total of $61.50. On March 24, the defendant entered his appearance and prayed an appeal to this court, which was allowed.

In urging a reversal of the judgment, the defendant refers to certain alleged facts which are not shown by the record and which we, therefore, can not take into consideration. In the brief filed, the defendant concedes that our courts have held valid under Section 85, Chapter 80 of the Illinois statutes, a power of warrant of attorney to confess judgment for accruing unpaid rent. That is just what this power of attorney here involved is, and

nothing more. At least, that is the extent to which this power was exercised in this case. Defendant can not complain about that part of the power, waiving, among other things, the right to appeal, whether or not that part is valid, because he is now enjoying that right without any attempt at interference by the plaintiff. The defendant urges that the court erred in including the amount of twenty-five dollars in the judgment as attorney's fees which, he urges, is out of proportion to the amount of the judgment. It is somewhat, but that is due, not so much to the size of the fee as to the small amount of rent that was due. The fee of twenty-five dollars was specified in the power of attorney and that can not be considered an unreasonable fee for going into court and confessing judgment under such power, even where the amount confessed to be due is not large. On this point counsel cites the case of Campbell v. Goddard, 117 Ill. 251, which is not in point, for the power of attorney there involved, provided for a "reasonable attorney's fee". Where the power of attorney specifies the amount to be allowed as attorney's fees, it will not be error to allow the amount so specified, unless it is clearly unreasonable, which can not be said of the amount allowed in this case.

The defendant urges upon our consideration the case of Little v. Dyer, 138 Ill. 272, which also is not in point. The judgment of the trial court is clearly supported by authorities and among them Agnew v. Sexton, 86 Ill. App. 274; Fortune v. Bartolomei, 164 Ill. 51; Bowman v. Powell, 127 Ill. App. 114. The power in the case at bar was exercised within its limitations and judgment was entered for a certain

nothing more. At least, that is the extent to which this power was exercised in this case. Defendant can not complain about that part of the power, waiving, among other things, the right to appeal, whether or not that part is valid, because he is now enjoying that right without any attempt at interference by the plaintiff. The defendant urges that the court erred in including the amount of twenty-five dollars in the judgment as attorney's fees which, he urges, is out of proportion to the amount of the judgment. It is somewhat, but that is due, not so much to the size of the fee as to the small amount of rent that was due. The fee of twenty-five dollars was specified in the power of attorney and that may not be considered an unreasonable fee for going into court and confessing judgment under such power, even where the amount confessed to be due is not large. On this point counsel cites the case of Campbell v. Hodgkins, 117 Ill. 381, which is not in point, for the power of attorney there involved, provided for a "reasonable attorney's fee". Where the power of attorney specifies the amount to be allowed as attorney's fees, it will not be error to allow the amount so specified, unless it is clearly unreasonable, which can not be said of the amount allowed in this case.

The defendant urges upon our consideration the case of Little v. Ayer, 138 Ill. 172, which also is not in point. The judgment of the trial court is clearly supported by authorities and among them Agnew v. Baxter, 86 Ill. App. 274; Fortune v. Bartlomei, 164 Ill. 81; Kirman v. Powell, 127 Ill. App. 114. The power in the case at bar was exercised within its limitations and judgment was entered for a certain

and liquidated sum, namely, one month's rent at the monthly rental specified in the lease.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

and liquidated sum, namely, one month's rent at the monthly rental specified in the lease.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

346 - 23691

OTTO SCHMIDT, Executor of the Estate of Rebecca Schmidt, deceased, Appellant, vs. SAMUEL C. PIRIE et al, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 367

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action in replevin brought by the plaintiff, Otto Schmidt, executor of the Estate of Rebecca Schmidt, deceased, against Carson, Pirie, Scott & Co. to recover certain furs. After suit was started, Simon Hausman, Henrietta Hausman, Samuel Lederer, and Lena Lederer, hereinafter referred to as the defendants were made parties to the suit as intervening defendants on motion of Carson, Pirie, Scott & Co. A trial was had before the court without a jury, as a result of which the court found that the right to the possession of the property replevied was not in the plaintiff and awarded a writ of return. From this judgment plaintiff appeals.

The deceased, Rebecca Schmidt, died in January 1916, at which time, the members of her immediate family were the plaintiff, her husband, three sons, and two daughters, the latter being the two defendants, Henrietta Hausman and Lena Lederer, the other two defendants being the husbands of those two daughters. The deceased left a will, by the terms of which, the plaintiff was her sole

346 - 23601

OTTO SCHMIDT, Executor of the Estate of Rebecca Schmidt, deceased, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
SAMUEL H. PIRIE et al., Appellees.	

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action in replevin brought by the plaintiff, Otto Schmidt, executor of the Estate of Rebecca Schmidt, deceased, against Larson, Pirie, Scott & Co. to recover certain furs. After suit was started, Simon Hausman, Henrietta Hausman, Samuel Lederer, and Lena Lederer, hereinafter referred to as the defendants were made parties to the suit as intervening defendants on motion of Larson, Pirie, Scott & Co. A trial was had before the court without a jury, as a result of which the court found that the right to the possession of the property replevied was not in the plaintiff and awarded a writ of return.

The deceased, Rebecca Schmidt, died in January 1916, at which time, the members of her immediate family were the plaintiff, her husband, three sons, and two daughters, the latter being the two defendants, Henrietta Hausman and Lena Lederer, the other two defendants being the husbands of those two daughters. The deceased left a will, by the terms of which, the plaintiff was her sole

beneficiary. The furs in question constituted a part of the personal estate and were taken into possession by the plaintiff. Some time later, these furs were stored with Carson, Pirie, Scott & Co. who gave receipts for them running to "Mr. Otto Schmidt and Mr. S. Hausman." It is not clear from the evidence just who turned the furs over to Carson, Pirie, Scott & Co. and received receipts therefor. The plaintiff testified that he told his daughter, Mrs. Hausman, to store them with Carson, Pirie, Scott & Co. Mrs. Hausman testifies that she thereupon telephoned, or had some one else telephone to Carson, Pirie Scott & Co., and they sent a man out to the home of Otto Schmidt where Mrs. Hausman seems to have been staying and the furs were delivered to the messenger and a receipt or card was given for them by the messenger. She states further she did not know who got the receipts until they were handed over to her by her father. The evidence further discloses that on several occasions, the plaintiff expressed the intention of giving the furs to his two daughters and that some time later, he handed the receipts for the furs to his daughter, Mrs. Hausman in the presence of the other daughter, Mrs. Lederer saying "Henrietta, I want you to take these receipts and divide the furs with your sister." Mrs. Hausman,says that this was the first time she had personally seen the receipts. Mrs. Lederer also testified to this conversation and the evidence shows that on a number of occasions subsequent to this, the plaintiff stated that he had given the furs to the two girls, giving his reasons for doing so. It seems the daughters never removed the furs from Carson, Pirie, Scott & Co. nor attempted to do so, but on one occasion, one or both of them, went to the store of Carson. Pirie, Scott & Co. and tried

beneficiary. The furs in question constituted a part of the personal estate and were taken into possession by the plaintiff. Some time later, these furs were stored with Garson, Pirie, Scott & Co. who gave receipts for them running to "Mr. Otto Schmidt and Mr. S. Hausman." It is not clear from the evidence just who turned the furs over to Garson, Pirie, Scott & Co. and received receipts therefor. The plaintiff testified that he told his daughter, Mrs. Hausman, to store them with Garson, Pirie, Scott & Co. Mrs. Hausman testifies that she thereupon telephoned, or had some one else telephone to Garson, Pirie Scott & Co., and they sent a man out to the home of Otto Schmidt where Mrs. Hausman seems to have been staying and the furs were delivered to the messenger and a receipt or card was given for them by the messenger. She states further she did not know who got the receipts until they were handed over to her by her father. The evidence further discloses that on several occasions, the plaintiff expressed the intention of giving the furs to his two daughters and that some time later, he handed the receipts for the furs to his daughter, Mrs. Hausman in the presence of the other daughter, Mrs. Ledorer saying "Henrietta I want you to take these receipts and divide the furs with your sister." Mrs. Hausman says that this was the first time she had personally seen the receipts. Mrs. Ledorer also testified to this conversation and the evidence shows that on a number of occasions subsequent to this, the plaintiff stated that he had given the furs to the two girls, giving his reasons for doing so. It seems the daughters never removed the furs from Garson, Pirie, Scott & Co. nor attempted to do so, but on one occasion, one or both of them, went to the store of Garson, Pirie, Scott & Co. and tried

some of the garments on for the purpose of ascertaining whether repairs or alterations were needed. The plaintiff seems to have had a change of heart some time later on, and he sent one of his sons to Carson, Pirie, Scott & Co. with a written note requesting them to deliver the furs to bearer which they declined to do, whereupon this action was begun. In contending that the judgment of the trial court should be reversed, the plaintiff has called our attention to the case of McCartney v. Ridgway, 160 Ill. 129. That case is not in point for, as the court there says on page 154, the provision which was there before the court for construction was "not a present gift, but a gift which the parties agreed among themselves should be made thereafter." Although the evidence in the case at bar is conflicting and the plaintiff denies a number of things which we have included in the statement of facts recited above, we believe after a careful examination of the record that it conclusively establishes the facts as we have related them. From those facts, it is quite evident that the plaintiff made a valid gift of the furs in question to his two daughters. The evidence is convincingly to the effect that when he handed the receipts for the furs to his daughter, Mrs. Hausman, in the presence of the other daughter, Mrs. Lederer, it was his intention to make an absolute and irrevocable gift of the furs called for by the receipts to them, and further, that it was his intention that the gift was to go into effect immediately. As a result of the gift, the two daughters acquired a joint interest in the furs in question and delivery of the receipts by the plaintiff to one of the daughters was, in effect, a delivery to both of them. East Rutherford

some of the garments on for the purpose of ascertaining whether repairs or alterations were needed. The plaintiff seems to have had a change of heart some time later on, and he sent one of his sons to Carson, Pirie, Scott & Co. with a written note requesting them to deliver the furs to bearer which they declined to do, whereupon this action was begun. In contending that the judgment of the trial court should be reversed, the plaintiff has called our attention to the case of McCartney v. Hickey, 180 Ill. 129. That case is not in point for, as the court there says on page 134, the provision which was there before the court for construction was "not a present gift, but a gift which the parties agreed among themselves should be made thereafter." Although the evidence in the case at bar is conflicting and the plaintiff denies a number of things which we have included in the statement of facts recited above, we believe after a careful examination of the record that it conclusively establishes the facts as we have related them. From these facts, it is quite evident that the plaintiff made a valid gift of the furs in question to his two daughters. The evidence is convincingly to the effect that when he handed the receipts for the furs to his daughter, Mrs. Hamann, in the presence of the other daughter, Mrs. Lederer, it was his intention to make an absolute and irrevocable gift of the furs called for by the receipts to them, and further, that it was his intention that the gift was to go into effect immediately. As a result of the gift, the two daughters acquired a joint interest in the furs in question and delivery of the receipts by the plaintiff to one of the daughters was, in effect, a delivery to both of them. Most Rutherford

Savings, Loan and Building Association v. McKenzie, 100 Atl. 931. It can not be contended that the plaintiff delivered the receipts to an agent accompanied by an expression on his part that the agent was to divide them between certain intended donees. The delivery of the receipts by the plaintiff was to the donees direct, accompanied by words that did not signify intention to give them the furs at any time in the future, but accompanied by words clearly constituting a present gift.

The receipts in question contained a provision to the effect that "in case of a desired delivery to any person other than the person herein named, a written order signed by the owner must accompany the coupon." The plaintiff contends that inasmuch as the delivery of the receipts was not accompanied by a written order on Carson, Pirie, Scott & Co. to deliver the furs to the one to whom the receipts were given, there was not a valid and irrevocable gift and that the presence of the clause required something further than the giving of the receipts, to be done in order to complete the gift. This contention is not sound. That point might well be urged as between the defendants and Carson, Pirie, Scott & Co., but the presence of such a clause in the receipts does not prevent the completion of a valid gift between the plaintiff and his daughters, where the evidence discloses such circumstances as conclusively show an intention on the part of the plaintiff at the time of the delivery of the receipts to the daughters to give them the furs in question. There would be a different situation, if at the time the plaintiff gave his daughters

Savings, Loan and Building Association v. McKenzie, 100 Atl. 931. It can not be contended that the plaintiff delivered the receipts to an agent accompanied by an expression on his part that the agent was to divide them between certain intended donees. The delivery of the receipts by the plaintiff was to the donees direct, accompanied by words that did not signify intention to give them the fund at any time in the future, but accompanied by words clearly constituting a present gift.

The receipts in question contained a provision to the effect that "in case of a desired delivery to any person other than the person herein named, a written order signed by the owner must accompany the coupon." The plaintiff contends that inasmuch as the delivery of the receipts was not accompanied by a written order on Carson, Pirie, Scott & Co. to deliver the ure to the one to whom the receipts were given, there was not a valid and irrevocable gift and that the absence of the clause required something further than the giving of the receipts, to be done in order to complete the gift. This contention is not sound. That point might well be urged as between the defendants and Carson, Pirie, Scott & Co., but the presence of such a clause in the receipts does not prevent the completion of a valid gift between the plaintiff and his daughters, where the evidence discloses such circumstances as conclusively show an intention on the part of the plaintiff at the time of the delivery of the receipts to the daughters to give them the fund in question. There would be a different situation, if at the time the plaintiff gave his daughters

the receipts, he had stated that he wanted them to possess the furs and that some time later, he would give them such a written order as, together with the receipts, would enable them to go to Carson, Pirie, Scott & Co. and get them, but that is not the evidence. It might well be noted that the receipts in question also contained the following clause "Carson, Pirie, Scott & CO. may deliver the articles represented by any or all of the coupons of this receipt according to the direction of any persons presenting said coupons." If the warehouseman chose to be governed by that clause in the receipts, they were, in effect, bearer receipts, but which ever clause is taken as the controlling one, in our opinion the delivery of the receipts by the plaintiff to his daughters, under the circumstances disclosed by the evidence, amounted to a valid gift of the furs by him to them.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

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Finding no error in the record, the judgment of the municipal court is affirmed.

AFFIRMED.

381 - 23726

ROBERT H. TAFT,

Appellant,

vs.

WILLIAM HERLEY,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

211 I.A. 369

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Robert H. Taft, brought this action against the defendant, William Herley, to recover the balance alleged to be due on a sale of forty-two shares of stock in the American Cereal-Coffee Company under a contract entered into by them. The statement of claim alleges that plaintiff's claim is "for balance due for purchase price of forty-two (42) shares of stock at the par value of $100.00 each in the American Cereal-Coffee Company, a corporation, under the laws of the State of Illinois as follows:

Purchase price	$3,600.00
By Cash	500.00
By Notes (now paid)	500.00
BALANCE	$2,600.00

The defendant's affidavit of merits avers that the parties entered into a verbal agreement for the purchase of the stock mentioned in the statement of claim, by which agreement the defendant was to pay $1,000.00 in cash and notes, and in addition thereto was to convey to the plaintiff certain real estate, and that the agreement fixed no value

381 - 28926

ROBERT H. TAFT, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
WILLIAM HERLEY, Appellee.	

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Robert H. Taft, brought this action against the defendant, William Herley, to recover the balance alleged to be due on a sale of forty-two shares of stock in the American General-Coffee Company under a contract entered into by them. The statement of claim alleges that plaintiff's claim is for balance due for purchase price of forty-two (42) shares of stock at the par value of $100.00 each in the American General-Coffee Company, a corporation, under the laws of the State of Illinois as follows:

Purchase price	$3,000.00
By Cash	500.00
By Notes (now paid)	500.00
BALANCE	$2,000.00

The defendant's affidavit of merits avers that the parties entered into a verbal agreement for the purchase of the stock mentioned in the statement of claim, by which agreement the defendant was to pay $1,000.00 in cash and notes, and in addition thereto was to convey to the plaintiff ceer-

for the real estate, nor was the purchase price of the stock fixed by the agreement. It is also alleged by the defendant in his affidavit of merits that the $1,000.00 which he has paid, exceeds the value of the stock and that certain representations made by the plaintiff at the time of the agreement, to the effect that it was earning a substantial profit, and that the company in question was in good financial standing, were false. The defendant also sets up the statute of frauds as a defense, in his affidavit of merits. The affidavit of merits also contains the averment that the defendant never tendered the shares of stock or made the request for the transfer of the real estate until the defendant instituted proceedings to recover back the sum of $1,000 that he had paid the plaintiff under the agreement. The plaintiff made a motion to strike the affidavit of merits from the files. The bill of exceptions shows that the trial court in denying this motion stated that "the motion on behalf of the plaintiff in this case was to strike the amended affidavit of merits from the files; the court holds said affidavit of merits in setting up the statute of frauds is a sufficient defense and it appearing to the court that the plaintiff states that he relies upon his statement of claim (as set forth above) and expects and intends to prove in support thereof that the plaintiff in this case entered into the contract as admitted and asserted by the defendant in his affidavit of merits, upon which statement the court holds that the evidence clearly shows a case where the statute of frauds applies; so that upon the pleadings, admission and statements of counsel, the finding of the court, is upon this hearing, for the defendant."

for the real estate, nor was the purchase price of the stock fixed by the agreement. It is also alleged by the defendant in his affidavit of merits that the $1,000.00 which he has paid, exceeds the value of the stock and that certain representations made by the plaintiff at the time of the agreement, to the effect that it was earning a substantial profit, and that the company in question was in good financial standing, were false. The defendant also sets up the statute of frauds as a defense, in his affidavit of merits. The affidavit of merits also contains the avvernment that the defendant never tendered the shares of stock or made the request for the transfer of the real estate until the defendant instituted proceedings to recover back the sum of $1,000 that he had paid the plaintiff under the agreement. The plaintiff made a motion to strike the affidavit of merits from the files. The bill of exceptions shows that the trial court in denying this motion stated that "the motion on behalf of the plaintiff in this case was to strike the amended affidavit of merits from the files; the court holds said affidavit of merits in setting up the statute of frauds is a sufficient defense and it appearing to the court that the plaintiff states that he relies upon his statement of claim (as set forth above) and expects and intends to prove in support thereof that the plaintiff in this case entered into the contract as admitted and asserted by the defendant in his affidavit of merits, upon which statement the court holds that the evidence clearly shows a case where the statute of frauds applies; so that upon the pleadings, admission and statements of counsel, the finding of the court, is upon this hearing, for the defendant."

Thereupon the court entered the judgment upon said finding in favor of the defendant and against the plaintiff, from which the plaintiff has appealed.

The only question presented on this appeal is, whether or not the case as thus made out by the pleadings and admissions of the parties as referred to by the trial court in making the finding, comes within the statute of frauds which provides that no action shall be brought to charge any person upon any contract for the sale of lands, unless such contract, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith.

In contending that the judgment and finding of the trial court was erroneous, the plaintiff has called our attention to certain authorities to the effect that, although a contract between parties comes within the statute of frauds and may, therefore, be avoided, nevertheless if it has been executed, an action will lie against the party receiving the benefits thereof as for money had and received, or goods sold and delivered. C. C.C. & St. L. Ry. Co. v. Wood, 189 Ill. 352; Eaton v. Graham, 104 Ill. App. 296, 302; Booker v. Wolf, 195 Ill. 365. These cases are not in point as they would have been if the plaintiff had filed a statement of claim reciting the contract and alleging the delivery of the stock to the defendant and its acceptance by him and his failure to turn over the agreed consideration for it to the plaintiff, and claiming the difference between the value of the stock as alleged, and such part of the consideration, if any, that had been turned over

by the defendant. After default has been made by either party to a contract voidable under the statute of frauds, neither party can sue the other on the basis of an implied agreement except as to such part of the voidable contract as he may have executed, and in order to recover in such an action, the plaintiff must both allege and prove that he has executed his part of the voidable contract, either in whole or in part, and on the basis of that execution, seek to recover the fair and reasonable compensation due him by reason of the execution. But no action can successfully be prosecuted based upon an implied contract where the expressed contract between the parties remains executory so far as the plaintiff is concerned.

In the case at bar, the plaintiff does not allege that he has executed the expressed contract which the parties made, by delivering the stock in question to the defendant, and it appears from the statement of the trial court contained in the bill of exceptions, as quoted above, that it was admitted by the plaintiff that in bringing his action, he was relying upon the expressed contract which the parties had made. That being the case, the affidavit of merits so setting up the statute of frauds, interposed a complete defense to the action.

There is an intimation in the affidavit of merits that after the defendant had paid the $1,000.00 under the expressed oral contract,he had made with the plaintiff, he sought to avoid the contract and recover the amount he had paid, whereupon the plaintiff made tender of the stock. By such tender, the plaintiff could not successfully place himself in a position which would permit him to sue

by the defendant. After default has been made by either party to a contract voidable under the statute of frauds, neither party can sue the other on the basis of an implied agreement except as to such part of the voidable contract as he may have executed, and in order to recover in such an action, the plaintiff must both allege and prove that he has executed his part of the voidable contract, either in whole or in part, and on the basis of that execution, seek to recover the fair and reasonable compensation due him by reason of the execution. But no action can successfully be prosecuted based upon an implied contract where the expressed contract between the parties remains executory so far as the plaintiff is concerned.

In the case at bar, the plaintiff does not allege that he has executed the expressed contract which the parties made, by delivering the stock in question to the defendant, and it appears from the abstract of the trial court contained in the bill of exceptions, as quoted above, that it was admitted by the plaintiff that in bringing his action, he was relying upon the expressed contract which the parties had made. That being the case, the affidavit of merits so setting up the statute of frauds, interposed a complete defense to the action.

There is an inclination in the affidavit of merits that after the defendant had paid the $1,000.00 under the expressed oral contract, he had made with the plaintiff, he sought to avoid the contract and recover the amount he had paid, whereupon the plaintiff made tender of the stock. By such tender, the plaintiff could not successfully place himself in a position which would permit him to sue

the defendant because, as we have already stated, the law will not imply any agreement in case of a contract voidable under the statute of frauds except as to such part of the contract as may have been executed. In such a case, the law implies an agreement or obligation on the part of the purchaser because it will not permit him to have the benefit of the execution of the contract by the plaintiff, and at the same time, avoid the payment of proper compensation to the plaintiff for the execution. In the case at bar, no such implied agreement will be created until and unless the defendant had received andaccepted the stock which was the subject of the expressed contract between the parties.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

the defendant because, as we have already stated, the law will not imply any agreement in case of a contract voidable under the statute of frauds except as to such part of the contract as may have been executed. In such a case, the law implies an agreement or obligation on the part of the purchaser because it will not permit him to have the benefit of the execution of the contract by the plaintiff, and at the same time, avoid the payment of proper compensation to the plaintiff for the execution. In the case at bar, no such implied agreement will be created until and unless the defendant had received and accepted the stock which was the subject of the expressed contract between the parties.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

408 - 23753

ABRAHAM M. LIEBLING,

Appellee,

vs.

CHARLES RENFER and
ANNA M. RENFER,

Appellants.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Abraham M. Liebling, brought this suit against the defendants, Charles Renfer and Anna M. Renfer to recover $750.00 which he paid them as earnest money under a contract providing for the purchase of certain real estate. A trial was had without a jury and the court found the issues for the plaintiff and entered a judgment against the defendants for the full amount of the claim, from which they have appealed. The contract was dated September 13, 1913, and was in the usual form of contracts for the purchase of real estate. The full contract price agreed upon by the parties was $20,000.00. The contract contained the following clauses: "said purchaser has paid $750.00 earnest money and agrees to pay in five days after title has been examined and found good and accepted by him, a further sum of $9,250.00 * * *" "complete merchantable abstract of title or merchantable copy thereof brought down to the date hereof or merchantable title guarantee policy by the Chicago Title and Trust Company shall be

ABRAHAM M. LIEBLING,

Appellee,

vs.

CHARLES HENRY and
ANNA M. HENRY,

Appellants.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Abraham M. Liebling, brought this suit against the defendants, Charles Henry and Anna M. Henry to recover $750.00 which he paid them as earnest money under a contract providing for the purchase of certain real estate. A trial was had without a jury and the court found the issues for the plaintiff and entered a judgment against the defendants for the full amount of the claim, from which they have appealed. The contract was dated September 13, 1912, and was in the usual form of contracts for the purchase of real estate. The full contract price agreed upon by the parties was $32,000.00. The contract contained the following clauses: "said purchaser has paid $750.00 earnest money and agrees to pay in five days after title has been examined and found good and accepted by him, a further sum of $9,250.00 * * *" "complete merchantable abstract of title or merchantable copy thereof brought down to the date hereof or merchantable title guarantee policy by the Chicago Title and Trust Company shall be

furnished by vendor within reasonable time, * * *.

It appears from the record that the defendants never tendered an abstract of title to the property in question or a guarantee policy, to the plaintiff. So far as the record shows, nothing was done by either party to the contract until the 29th of November, when the defendant, Charles Renfer, saw the plaintiff and said to him "How about closing up with that property? I have got to have the money." At this time, an opinion of title by the Chicago Title and Trust Company was tendered to the plaintiff. There is conflict in the testimony as to what the plaintiff replied at that time. The defendant Renfer testified that his reply was "Charlie, I am a sport. I can't come across." The plaintiff testifies that what he told the defendant at that time was, he "couldn't do anything within two weeks; that after two weeks it would be all right, in good shape. The plaintiff further testifies that the defendant said that it had to be done immediately. He testified further that about two wweks later he went to the defendant Renfer with a certified check for the amount then due under the contract and asked him to carry out the deal, but that Renfer then said to him "You can't buy this now;" and that he then raised his price to $22,000.00. The defendant Renfer denies that he had ever raised his price and on the witness stand, stated that he had told the plaintiff a good many times "when you come across with $20,000.00 you can have it." On re-cross examination, counsel for the plaintiff asked the defendant, Renfer, "are you perfectly willing to close the deal now on the basis of this contract? Renfer replied that he would do business with

furnished by vendor within reasonable time. * * *.

It appears from the record that the defendants never tendered an abstract of title to the property in question or a guarantee policy, to the plaintiff. So far as the record shows, nothing was done by either party to the contract until the 25th of November, when the defendant, Charles Reifer, saw the plaintiff and said to him "How about closing up with that property? I have got to have the money." At this time, an opinion of title by the Chicago Title and Trust Company was tendered to the plaintiff. There is conflict in the testimony as to what the plaintiff replied at that time. The defendant Reifer testified that his reply was "Charlie, I am a sport. I can't come across." The plaintiff testifies that what he told the defendant at that time was, he "couldn't do anything within two weeks; that after two weeks it would be all right, in good shape. The plaintiff further testifies that the defendant said that it had to be done immediately. He testified further that about two weeks later he went to the defendant Reifer with a certified check for the amount then due under the contract and asked him to carry out the deal, but that Reifer then said to him "You can't buy this now;" and that he then raised his price to $22,000.00. The defendant Reifer denies that he had ever raised his price and on the witness stand, stated that he had told the plaintiff a good many times "when you come across with $20,000.00 you can have it." On re-cross examination, counsel for the plaintiff asked the defendant, Reifer, "Are you perfectly willing to close the deal now on the basis of this contract? Reifer replied that he would do business with

the plaintiff on the basis of $20,000.00 outside of the contract, but was unwilling to credit the $750.00 on the contract, saying that the question as to the $750.00 was "up to the court to decide." The trial court decided that under all the facts, the plaintiff was entitled to a return of the money he had paid.

In urging a reversal of the judgment below, the defendants contend that, although it was incumbent upon them, under the terms of the contract to furnish the plaintiff with a merchantable abstract of title or a guarantee policy before the plaintiff could be placed in default, this performance on their part was waived by the plaintiff when he said that he "couldn't come across," thus intimating he was not in a position to carry out the contract. In the view we take of this case, this is the only question involved here. There is some argument in the briefs submitted by counsel on both sides on the question of whether the amount paid as earnest money is to be considered as a penalty or as liquidated damages. That question we deem to be entirely immaterial under the facts of the case. It is admitted that no abstract of title and guarantee policy was ever submitted to the plaintiff by the defendants, although at one time, but it is not clear from the record, just when, the defendants executed a warranty deed conveying the property to the plaintiff. Although time is declared to be the essence of the contract, by its terms, the defendants are not in a position to raise any question as to time of performance of any of its conditions, for, it appears some six weeks elapsed after the contract was signed, before any attempt was made by them to submit anything to the plaintiff as evidence of

the plaintiff on the basis of $50,000.00 outside of the contract, but was unwilling to credit the $750.00 on the contract, saying that the question as to the $750.00 was "up to the court to decide." The trial court decided that under all the facts, the plaintiff was entitled to a return of the money he had paid.

In urging a reversal of the judgment below, the defendants contend that, although it was incumbent upon them, under the terms of the contract, to furnish the plaintiff with a merchantable abstract of title or a guarantee policy before the plaintiff could be placed in default, this performance on their part was waived by the plaintiff when he said that he "couldn't come up," thus intimating he was not in a position to carry out the contract. In the view we take of this case, that is the only question involved here. There is no argument in the briefs submitted by counsel on both sides on a question of whether the amount paid as earnest money is to be considered as a penalty or as liquidated damages. This question we deem to be entirely immaterial under the facts of the case. It is admitted that no abstract of title and guarantee policy was ever submitted to the plaintiff by the defendants. Although at one time, but it is not clear from the record, just when, the defendants executed a warranty deed covering the property to the plaintiff, although this is denied to be the evidence of the contract, by the way, the defendants are not in a position to raise the question as to the lack of performance of any of its conditions, for, it appears some weeks elapsed after the contract was signed, before any attempt was made by them to submit any thing to the plaintiff as evidence of

the condition of the title and it was some two weeks after that, that the plaintiff testifies he tendered the defendant Renfer a check for "the full amount then due under the contract." The defendant Renfer testified that at no time did the plaintiff say he would be able to carry out the terms of the contract.

In our opinion, the trial court did not err in finding that there was no waiver on the part of the plaintiff as to the performance of those conditions of the contract on the part of the defendants involving the delivery of a complete merchantable abstract of title, or a merchantable copy brought down to the date of the contract, or a merchantable title guarantee policy to the Chicago Title and Trust Company. The defendants had the burden of proof on that point (40 Cyc. 269) and as the trial court stated, they failed to sustain it. If there was no waiver on the part of the plaintiff, he could not be placed in default under the terms of the contract until the defendants had performed the conditions incumbent upon them under the contract as to the furnishing of an abstract of title or a guarantee policy. Even assuming that the defendants complied with that condition in submitting the opinion of title by the Chicago Title and Trust Company, the tender of the certified check by the plaintiff for "full amount then due under the contract" was a sufficient compliance with the contract on the part of the plaintiff, even though a tender of that certified check did not occur until two weeks after the submission of the opinion of title. This was a sufficient compliance with the contract so far as the

the condition of the title and it was some two weeks after that, that the plaintiff testified he tendered the defendant Reafer a check for "the full amount then due under the contract." The defendant Reafer testified that at no time did the plaintiff say he would be able to carry out the terms of the contract.

In our opinion, the trial court did not err in finding that there was no waiver on the part of the plaintiff as to the performance of these conditions of the contract on the part of the defendants involving the delivery of a complete merchantable abstract of title, or a merchantable copy brought down to the date of the contract, or a merchantable title guarantee policy to the Chicago Title and Trust Company. The defendants had the burden of proof on that point (40 Cyc. 3?9) and as the trial court stated, they failed to sustain it. If there was no waiver on the part of the plaintiff, he could not be placed in default under the terms of the contract until the defendants had performed the conditions incumbent upon them under the contract as to the furnishing of an abstract of title or a guarantee policy. Even assuming that the defendants complied with that condition in submitting the opinion of title by the Chicago Title and Trust Company, the tender of the certified check by the plaintiff for "full amount then due under the contract" was a sufficient compliance with the contract on the part of the plaintiff, even though a tender of that certified check did not occur until two weeks after the submission of the opinion of title. This was a sufficient compliance with the contract so far as t

time of performance is concerned in view of the fact that the defendants had allowed some six weeks to elapse between the date of the contract and the time when, so far as the record shows, they tendered the alleged opinion of title to the plaintiff.

Finding no error in the record, the judgment of the County Court is affirmed.

AFFIRMED.

time of performance is concerned in view of the fact that the defendants had allowed some six weeks to elapse between the date of the contract and the time when, so far as the record shows, they tendered the alleged opinion of title to the plaintiff.

Finding no error in the record, the judgment of the County Court is affirmed.

AFFIRMED.

255 - 23600

FRANCES BOWSER,
Appellee,

vs.

MUSICAL COURIER COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $388.25 recovered by plaintiff for commissions alleged to be due.

Plaintiff was employed by defendant to solicit subscriptions to the latter's publication and contracts for advertising matter to be inserted therein. The contract of employment was a verbal one and the only dispite between the parties is as to the time the payment of the commissions earned by the plaintiff was to be made. It is plaintiff's contention that they were to be paid according to the terms of each subscription or advertising contract procured by her and accepted by the defendant, while the defendant insists that plaintiff's commissions were not payable until the amounts due on the contracts solicited by plaintiff had been paid. All uncertainty on this point might have been avoided by making a written contract of employment, in the absence of which resort must be had to the evidence of the parties, in order to determine such question. The court found the issues for the plaintiff, and inasmuch as the evidence is conflicting, we are unable to say that such finding is clearly and manifestly against the weight of the evidence.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

255 - 25600

FRANCES BORGER,
Appellee,

vs.

MUSICAL COURIER COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for $308.25 recovered by plaintiff for commissions alleged to be due.

Plaintiff was employed by defendant to solicit subscriptions to the latter's publication and contracts for advertising matter to be inserted therein. The contract of employment was a verbal one and the only dispute between the parties is as to the time the payment of the commissions earned by the plaintiff was to be made. It is plaintiff's contention that they were to be paid according to the terms of each subscription or advertising contract procured by her and accepted by the defendant, while the defendant insists that plaintiff's commissions were not payable until the amounts due on the contracts collected by plaintiff had been paid. All uncertainty on this point might have been avoided by making a written contract of employment, in the absence of which resort must be had to the evidence of the parties, in order to determine such question. The court found the issues for the plaintiff, and inasmuch as the evidence is conflicting, we are unable to say that such finding is clearly and manifestly against the weight of the evidence.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

5 - 23181

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HELEN GUTHMAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

211 I.A. 373

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of being an inmate of a house of ill fame, in violation of Sec. 57 a-1, chap. 38, R. S. The cause was tried before the court without a jury. There was a finding of guilty and defendant was sentenced to imprisonment in the house of correction for a term of sixty days.

The gravamen of the defendant's complaint is that she was arrested without a warrant. We think that as defendant submitted herself to the jurisdiction of the court without challenging the mode or manner of her arrest, the court had consequently jurisdiction to hear the case and pronounce judgment.

The Criminal Code provides that an officer may arrest a person if he has reasonable ground for believing that the person arrested has committed a crime. While this is admitted by defendant's counsel, he contends that this has application only to cases of felony and not to misdemeanors. It is also argued that the offense charged could not have been committed in the presence of the officer.

In the absence of the evidence we must assume that the offense charged was committed in the presence of the officer, and that such evidence proved that defendant was an

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HELEN GUTHMAN,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

211 I.A. 373

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of being an inmate of a House of ill fame, in violation of Sec. 87 c-1, chap. 38, R. S. The cause was tried before the court without a jury. There was a finding of guilty and defendant was sentenced to imprisonment in the House of correction for a term of sixty days.

The gravamen of the defendant's complaint is that she was arrested without a warrant. We think that as defendant submitted herself to the jurisdiction of the court without challenging the mode or manner of her arrest, the court had some manner jurisdiction to hear the case and pronounce judgment.

The criminal code provides that an officer may arrest a person if he has reasonable ground for believing that the person arrested has committed a crime. While this is admitted by defendant's counsel, he contends that this has application only to cases of felony and not to misdemeanors. It is also argued that the offense charged could not have been committed in the presence of the officer.

In the absence of the evidence we must assume that the offense charged was committed in the presence of the officer, and that such evidence proved that defendant was an

inmate as charged.

On the assumption which obtains in the condition of this record that the offense charged in the complaint was committed in the presence of the officer making the arrest, such arrest was lawful and could be made, as it was, without the issuance of a warrant. The rule on this subject is well stated in vol. I, Bishop's Criminal Procedure, p. 128, thus:

> "Where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for 'why issue a warrant for the apprehension of a party already in custody?' But a written complaint or information against the defendant, setting out his offense, is necessary in such a case as in any other." Schwartz v. Poehlman, 178 Ill. App. 235; People v. Barkas, 255 Ill. 516.

There is no reversible error in this record and the judgment of the Municipal court is therefore affirmed.

AFFIRMED.

insane as charged.

On the assumption which obtains in the condition of this record that the offense charged in the complaint was committed in the presence of the officer making the arrest, such arrest was lawful and could be made, as it was, without the issuance of a warrant. The rule on this subject is well stated in vol. 1, Bishop's Criminal Procedure, p. 188, thus:

> "Where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for 'why issue a warrant for the apprehension of a party already in custody?' But a written complaint or information against the defendant, setting out his offense, is necessary in such a case as in any other." Schwartz v. Fechiman, 178 Ill. App. 235; People v. Parks, 255 Ill. 316.

There is no reversible error in this record and the judgment of the municipal court is therefore affirmed.

AFFIRMED.

25 23551

FRANK A. MESSENGER,
Defendant in Error,

vs.

MRS. A. B. WENDELL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 374

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The action is of the first class, for goods sold and delivered according to an itemized statement attached to the statement of claim. The action was commenced against Edward Wendell and Mrs. A. B. Wendell and the statement of claim declared against them as jointly liable. Before the trial the suit was discontinued as to Edward Wendell and there was no amendment of the pleadings thereafter. The cause was submitted to the court, who made a finding in favor of plaintiff and against defendant with an assessment of damages at $1828.54, upon which judgment was entered.

The errors argued resolve themselves into but one contention, viz: that the statement of claim not having been amended after Edward Wendell was dismissed out of the cause, it is not sufficient to sustain the judgment.

From the record it may at this point be said that this question is raised here for the first time.

The parties proceeded to trial voluntarily and without objection as to the state of the pleadings. The statutory record only is before us; we must therefore assume that the evidence warranted the finding and judgment. Defendant might have advantaged of the imperfection in the

FRANK A. ASSERMEYER,
Defendant in error,

vs.

MRS. A. H. WENDELL,
Plaintiff in error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE HUTCHSON
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The action is of the first class, for goods sold and delivered according to an itemized statement attached to the statement of claim. The action was commenced against Edward Wendell and Mrs. A. H. Wendell and the statement of claim declared against them as jointly liable. Before the trial the suit was discontinued as to Edward Wendell and there was no amendment of the pleadings thereafter. The cause was submitted to the court, who made a finding in favor of plaintiff and against defendant with an assessment of damages at $1888.54, upon which judgment was entered.

The errors argued resolve themselves into but one contention, viz: that the statement of claim not having been amended after Edward Wendell was dismissed out of the cause, it is not sufficient to sustain the judgment.

From the record it appears at this point be said that this question is raised here for the first time.

The parties proceeded to trial voluntarily and without objection as to the state of the pleadings. The statutory record only is before us; we must therefore assume that the evidence warranted the finding and judgment. Defendant might have advantaged of the imperfection in the

statement of claim by demurring thereto. In Condon v. Schoenfeld, 214 Ill. 226, the court found that after the dismissal of one defendant the proofs showed there was no cause of action against the remaining defendant, and it therefore reversed the judgment. But this case is not analogous to the one under discussion.

In the absence of evidence to the contrary the presumption obtains that the evidence heard warrants the finding and supports the judgment. The verdict cures the infirmity in the statement of claim. Furthermore, in actions ex contractu joint obligations are by statute made joint or several. Sec. 3, chap. 76, R. S., is as follows:

> "All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Combs v. Steele et al., 80 Ill. 101.

So that whether the obligation was joint or several, either party thereto might have been proceeded against singly.

The infirmity charged as existing in the statement of claim would have been well taken if made in the trial court; but the infirmity is cured by the verdict; the rule regarding this being that where there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been fatal to objection upon demurrer, yet if the issue found be such as necessarily required on the trial proof of the fact so defectively or imperfectly stated, or omitted, and without which it is not to be presumed the judge would have directed the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. 1 Chitty's Pl. 672; Keegan v. Kinnare, 123 Ill. 280; Chicago and Eastern Illinois Railroad Company v. Hines, 132 Ill. 161; Chicago and Alton Railroad Co. v. Clausen, 173 ibid 100; City of Chicago v. Lonergan, 196 ibid 518; Storm v. Cleveland, 156 Ill. App. 88; B. & O. S.

statement of claim by demurring thereto. In London v. Schoenfield, 214 Ill. 286, the court found that after the dismissal of one defendant the proofs showed there was no cause of action against the remaining defendant, and it therefore reversed the judgment. But this case is not analogous to the one under discussion.

In the absence of evidence to the contrary the presumption obtains that the evidence heard warrants the finding and supports the judgment. The verdict cures the infirmity in the statement of claim. Furthermore, in actions ex contractu joint obligations are by statute made joint or several. Sec. 3, chap. 76, R. S., is as follows:

> "All joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Combs v. Steele et al., 80 Ill. 101.

So that whether the obligation was joint or several, either party thereto might have been proceeded against singly.

The infirmity emerged as existing in the statement of claim would have been well taken if made in the trial court; but the infirmity is cured by the verdict; the rule regarding this being that where there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been fatal to objection upon demurrer, yet if the issue found be such as necessarily required on the trial proof of the fact so defectively or imperfectly stated, or omitted, and without which it is not to be presumed the judge would have directed the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict. 1 Chitty's Pl. 672; Keegan v. Kinnare, 123 Ill. 280; Chicago and Eastern Illinois Railroad Company v. Hines, 132 Ill. 161; Chicago and Alton Railroad Co. v. Clausen, 173 Ibid 100; City of Chicago v. Lonergan, 186 Ibid 318; Storm v. Cleveland, 136 Ill. App. 88; R. & C. R.

W. Ry. Co. v. Keck, 185 Ill. 400; Knisley v. Brown, 95 Ill. App. 516; City of Elgin v. Thompson, 98 ibid 358; C. & A. R. R. Co. v. Murphy, 99 ibid 126.

In Carnegie v. Downey, 178 ibid 413, it was held that the rule that in a joint action ex contractu a dismissal as to one defendant effects a discontinuance of the entire action, does not apply where the party against whom dismissal was had was not a party to the contract.

In the light of the authorities cited and in the absence of the evidence, we must assume that the defendant who was dismissed out of the action was not a party to the contract in suit, but that the obligation was the several obligation of defendant and that proof of such fact was made by the evidence. As held in C. & A. R. R. Co. v. Clausen, supra, a defect in pleading, in substance or form, which would be fatal on demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts so imperfectly stated or omitted.

For the foregoing reasons the judgment of the Municipal court is affirmed.

AFFIRMED.

N. Y. Co. v. Keck, 185 Ill. 400; Kinsley v. Brown, 95 Ill. App. 518; City of Milan v. Thompson, 98 Ind 358; C. & A. R. R. Co. v. Murphy, 99 Ind 126.

In Carnegie v. Tawney, 172 Ind 412, it was held that the rule that in a joint action ex contractu a dismissal as to one defendant effects a discontinuance of the entire action, does not apply where the party against whom dismissal was had was not a party to the contract.

In the light of the authorities cited and in the absence of the evidence, we must assume that the defendant who was dismissed out of the action was not a party to the contract in suit, but that the obligation was the several obligation of defendant and that proof of such fact was made by the evidence. As held in C. & A. R. R. Co. v. Gleason, supra, a defect in pleading, in substance or form, which would be fatal on demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts so imperfectly stated or omitted.

For the foregoing reasons the judgment of the municipal court is affirmed.

AFFIRMED.

46 - 23937

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MATTHEW BRADY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of non-support on an information filed by his wife. The information charged that defendant then and there, without reasonable cause, did neglect and refuse to maintain and provide for his wife, who was then and there in destitute and necessitous circumstances.

Defendant waived trial by jury and the cause was submitted to the court, who found him guilty.

The record recites that defendant was present in his own proper person and that he was also represented by counsel. He was on his own motion released on probation and gave bond, as the statute provides. For a violation of the condition of his probation he was brought into court and was ordered to pay his wife $10 a week. Subsequently he made a motion to vacate the finding and judgment of the court. The affidavits in support of this motion were extremely rhetorical and did not present any facts excusing defendant from interposing as a defense at the time of his trial the matters disclosed in the affidavits. We cannot therefore say that the trial Judge abused the discretion which the law reposes in him in such cases.

46 - 25937

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

va.

MATTHEW MALOY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

PIETA, STO

MR. PRESIDING JUSTICE MCLAUGH

DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of non-support on an information filed by his wife. The information charged that defendant then and there, without reasonable cause, did neglect and refuse to maintain and provide for his wife, who was then and there in destitute and necessitous circumstances.

Defendant waived trial by jury and the cause was submitted to the court. [illegible]

The record [illegible] defendant was present in his own proper person [illegible] also represented by counsel. He was on his own motion released on probation and gave bond, as the statute provides. For a violation of the condition of his probation he was brought into court and was ordered to pay his wife [illegible] a week. Subsequently he made a motion to vacate the finding and judgment of the court. The affidavits in support of this motion are extremely rhetorical and did not present any facts excusing defendant from temporarily as a defense at the time of his trial. The matters disclosed in the affidavits [illegible] cannot therefore say that the trial judge abused the discretion which the law vesses in him in such cases.

It is urged that defendant was deprived of his statutory right to be represented by counsel. In view of the record, which recites that he was represented by counsel upon the trial, this objection fails.

It is also urged that the court's finding that defendant was guilty "in manner and form as charged in the information herein" does not find him guilty of the offense charged. We think, however, that the finding was sufficient. It was held in People v. Murphy, 188 Ill. 144, that a verdict of guilty in manner and form as charged in the indictment was a sufficient finding that the defendant was guilty of murder, and that the judgment on such finding was sufficient.

The evidence not being before us, we cannot say that the judgment is not supported thereby.

There being no reversible error in this record, the judgment of the Municipal court is affirmed.

AFFIRMED.

It is urged that defendant was deprived of his statutory right to be represented by counsel. In view of the record, which recites that he was represented by counsel upon the trial, this objection fails.

It is also urged that the court's finding that defendant was guilty "in manner and form as charged in the information herein" does not find his guilty of the offense charged. We think, however, that the finding was sufficient. It was held in People v. Rainey, 168 Ill. 144, that a verdict of guilty in manner and form as charged in the indictment was a sufficient finding that the defendant was guilty of murder, and that the judgment on such finding was sufficient.

The evidence not being before us, we cannot say that the judgment is not supported thereby.

There being no reversible error in this record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

82 - 23994

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

PETER TUHL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

211 I.A. 377

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of the criminal offense of "larceny of the value of $5," sentenced to a term of one year in the house of correction, fined $25 and condemned to pay the costs.

The evidence is not before us. The statutory record only has been filed.

Defendant urges two points for reversal - one, that the information charges that the subject of the larceny was "the personal goods and property of the P. C. C. and St. L. R. R. Co.," the other, that the finding of the court does not fix the value of the property which defendant was convicted of stealing.

In the condition of the record neither of these points is tenable. For aught that is disclosed by the record the name of the corporation that owned the property stolen is, as alleged in the information, the P. C. C. and St. L. R. R. Co. If it were otherwise, it would follow that the information would be insufficient under the authority of Accola v. Chicago, Burlington & Quincy Ry. Co., 70 Iowa, 185. In that case the record shows that the defendant, designated as "C. B. & Q. R. R. Co.," was in fact the Chicago, Burlington

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

PETER TUHL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of the criminal offense of "larceny of the value of $5," sentenced to a term of one year in the house of correction, fined $25 and condemned to pay the costs.

The evidence is not before us. The abstract record only has been filed.

Defendant urges two points for reversal - one, that the information charges that the subject of the larceny was "the personal goods and property of the I. C. C. and St. L. R. R. Co.," the other, that the finding of the court does not fix the value of the property which defendant was convicted of stealing.

In the condition of the record neither of these points is tenable. Nor ought that it discussed by the record the name of the corporation that owned the property stolen is, as alleged in the information, the I. C. C. and St. L. R. R. Co. If it were otherwise, it would follow that the information would be insufficient under the authority of Accola v. Chicago, Burlington & Quincy Ry. Co., 77 Iowa, 183. In that case the record showed that the defendant, designated as "C. R. & Q. R. R. Co.," was in fact the [illegible], Burlington

& Quincy Railway Company. While we may have a grave suspicion that the P. C. C. and St. L. R. R. Co. may not be a corporation chartered under these initials, yet we have no right to decide the cause according to our suspicion dehors the record.

It has often been decided that an essential part of the finding in a larceny case, by either court or jury, is the value of the property the subject of the larceny. This cannot be dispensed with, as it is necessary to find the value in order to fix the punishment under the statute. But we are of the opinion that the finding by the court that defendant was guilty of "the criminal offense of larceny to the value of $5," though inartificial, meets the statutory requirement.

There being no reversible error in this record, the judgment of the Municipal court is affirmed.

AFFIRMED.

& Quincy Railway Company. While we may have a grave suspicion that the K. C. C. and St. L. R. R. Co. may not be a corporation chartered under these initials, yet we have no right to decide the cause according to our suspicion *before* the record.

It has often been decided that an essential part of the finding in a larceny case, by either court or jury, is the value of the property the subject of the larceny. This cannot be dispensed with, as it is necessary to find the value in order to fix the punishment under the statute. But we are of the opinion that the finding by the court that defendant was guilty of "the criminal offense of larceny to the value of $5." though inartificial, meets the statutory requirement.

There being no reversible error in this record, the judgment of the municipal court is affirmed.

AFFIRMED.

102 - 24018

AMERICAN STEEL SPRING CO.,
a corporation,
Appellee,

vs.

WILLIAM J. BOYER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 379

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal by defendant from a judgment against it of $57.80, entered upon the finding of the trial Judge, to whom the cause was submitted.

Plaintiff sued defendant for the amount of the judgment on the claim that it had ordered certain springs of a designated design, which were not kept in stock by plaintiff but were made specially for defendant; that defendant refused to accept the springs when they were tendered, and that as they were of no use or value to plaintiff the damage suffered by defendant's breach of the claimed contract was the full amount of the price named in the so-called contract.

The transaction was conducted by correspondence, and while there were personal interviews and talks over the telephone, each was confirmed by a letter. The first letter was written April 17, 1916, by plaintiff to defendant, in which the price of the springs was quoted, the letter concluding: "Trusting that we may be favored with your order by return mail; we beg to remain." The next letter was also by plaintiff to defendant in answer to defendant's telephone call, in which letter plaintiff wrote: "In answer to your phone request, we are pleased to quote you the following prices on swivel hook springs:" (here setting forth the kind,

102 - 24018

AMERICAN STEEL SPRING CO., a corporation, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
WILLIAM J. BOYER, Appellant.	

211 I.A. 379

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal by defendant from a judgment against it of $27.80, entered upon the finding of the trial judge, to whom the cause was submitted.

Plaintiff sued defendant for the amount of the judgment on the claim that it had ordered certain springs of a designated design, which were not kept in stock by plaintiff but were made specially for defendant; that defendant refused to accept the springs when they were tendered, and that as they were of no use or value to plaintiff the damage suffered by defendant's breach of the claimed contract was the full amount of the price named in the so-called contract.

The transaction was conducted by correspondence, and while there were personal interviews and talks over the telephone, each was confirmed by a letter. The first letter was written April 17, 1916, by plaintiff to defendant, in which the price of the springs was quoted, the letter concluding: "Trusting that we may be favored with your order by return mail, we beg to remain." The next letter was also by plaintiff to defendant in answer to defendant's telephone call, in which letter plaintiff wrote: "In answer to your phone request, we are pleased to quote you the following prices on swivel hook springs:" (here setting forth the kind,

sizes and prices of the springs.) "We are able to make delivery on above within ten days after receipt of order. Terms C. O. D. * * * * * and trusting that we may be favored with your valued order by return mail, we beg to remain."

Under date of April 24, 1916, defendant wrote plaintiff confirming the order by telephone, in which letter defendant said, among other things: "As I have done no business with you before, your terms C. O. D. are satisfactory." Two days thereafter plaintiff wrote defendant: "We are in receipt of your letter of April 24th and in reply will state that you have misunderstood our quotations," and then proceeded to quote prices, quantities and sizes of springs, continuing: "Before proceeding with order, it will be necessary for us to have cash in advance on account of the springs being a special type. Trusting that these prices will be satisfactory to you, and that you will instruct us to proceed with the order, we beg to remain." This closed the correspondence, and defendant, not being willing to accede to the changed terms from C. O. D. to cash in advance, paid no further attention to the matter, and nothing thereafter took place between the parties.

It is apparent from the foregoing that the minds of the parties did not meet and that there was, therefore, no contract between them.

The record shows that the trial Judge stated in rendering his judgment that he was sitting as judge and jury in the case, and had in considering the preponderance of the evidence taken into consideration the manner of the witnesses testifying, their candor or lack of candor, and their demeanor while testifying, that from such observations he was of the opinion that defendant was not telling the truth.

sizes and prices of the springs.) "We are able to make delivery on above within ten days after receipt of order. Terms C. C. D. * * * * * and trusting that we may be favored with your valued order by return mail, we beg to remain."

Under date of April 24, 1911, defendant wrote plaintiff confirming the order by telegram, in which letter defendant said, among other things: "As I have done no business with you before, your terms C. C. D. are satisfactory." Two days thereafter plaintiff wrote defendant: "We are in receipt of your letter of April 24th and in reply will state that you have misunderstood our quotations," and then proceeded to quote prices, quantities and sizes of springs, concluding: "Before proceeding with order, it will be necessary for us to have cash in advance on account of the springs being a special type. Trusting that these prices will be satisfactory to you, and that you will instruct us to proceed with the order, we beg to remain." This closed the correspondence, and defendant, not being willing to accede to the changed terms from C. C. D. to cash in advance, gave no further attention to the matter, and nothing thereafter took place between the parties.

It is apparent from the foregoing that the minds of the parties did not meet and that there was, therefore, no contract between them.

The record shows that the trial judge erred in rendering his judgment when he was sitting as judge and jury in the case, and had in considering the preponderance of the evidence taken into consideration the manner of the witnesses testifying, their demeanor or lack of candor, and their deportment while testifying, that from such observations he was of the opinion that defendant was not telling the truth.

As it was not disputed that the letters in evidence were relied upon by plaintiff as constituting the contract, we are unable to understand the applicability of the observations of the trial Judge. The letters in evidence were offered by plaintiff and received in evidence as a part of its case. It is not claimed that there was any further dealings between the parties subsequent to the letter of plaintiff changing the former terms from C. O. D. to cash.

As the evidence fails to disclose a contract between the parties regarding the subject-matter in the suit, plaintiff has no right of action, and the judgment of the Municipal court is reversed and judgment of nil capiat and for costs entered here.

REVERSED WITH JUDGMENT OF NIL CAPIAT
AND FOR COSTS.

As it was not disputed that the letters in evidence were relied upon by plaintiff as constituting the contract, we are unable to understand the applicability of the observations of the trial Judge. The letters in evidence were offered by plaintiff and received in evidence as a part of its case. It is not claimed that there was any further dealings between the parties subsequent to the letter of plaintiff changing the former terms from C. O. D. to cash.

As the evidence fails to disclose a contract between the parties regarding the subject-matter in the suit, plaintiff has no right of action, and the judgment of the Municipal court is reversed and judgment of nil dicit and for costs entered here.

REVERSED WITH JUDGMENT OF NIL DICIT AND FOR COSTS.

23 - 23529

JOHN CHYLEWSKI,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

WRIT OF ERROR TO CIRCUIT COURT OF COOK COUNTY.

211 I.A. 389

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition in the Circuit Court of Cook County for a writ of mandamus to compel the defendant to restore petitioner to a position in the Police Department of the City of Chicago as a patrolman, from which position it was alleged he had been unlawfully discharged on December 22, 1909.

The petitioner attempts to give various reasons in his petition in support of his contention that his discharge from the police force was illegal. The respondent, City of Chicago, interposed a general demurrer to the petition. The court overruled this demurrer and, respondent electing to stand by its demurrer, judgment was rendered in accordance with the prayer of the petition. Respondent brings the case here by writ of error for review.

There are several sufficient reasons shown by the brief and argument of counsel for respondent why the judgment of the Circuit court should be reversed. The allegations of fact set out in the petition are in the main the mere conclusions of the petitioner. While it is attempted to show therein that the Civil Service Commission was without jurisdiction to discharge petitioner, no facts are set forth from which we are enabled to say that the Civil Service Commission was without power to enter the order of which petitioner complains.

JOHN CHYLEWSKI,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

WRIT OF ERROR TO CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE DRAPER DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition in the Circuit Court of Cook County for a writ of mandamus to compel the defendant to restore petitioner to a position in the Police Department of the City of Chicago as a patrolman, from which position it was alleged he had been unlawfully discharged on December 22, 1920.

The petitioner attempts to give various reasons in his petition in support of his contention that his discharge from the police force was illegal. The respondent, City of Chicago, interposed a general demurrer to the petition. The court overruled his demurrer and, respondent electing to stand by its demurrer, judgment was rendered in accordance with the prayer of the petition. Respondent brings the case here by writ of error for review.

There are several sufficient reasons shown by the brief and argument of counsel for respondent why the judgment of the circuit court should be reversed. The allegations of fact set out in the petition are in no way the mere conclusions of the petitioner. While it is attempted to show thereby that the Civil Service Commission was without jurisdiction to discharge petitioner, no facts are set forth from which we are enabled to say that the Civil Service Commission was without power to enter the order of which petitioner complains.

It is asserted in the petition that the petitioner's rights depend in some measure upon municipal ordinances. These ordinances were not set out in the petition in haec verba or in substance. It is elementary that the courts will not take judicial notice of the provisions of municipal ordinances, and that the duty is imposed upon persons relying on such ordinances to allege and prove them. People v. Busse, 248 Ill. 16, 17.

But aside from these and other questions raised by the demurrer which was overruled, the petitioner is not entitled to the relief prayed for in his petition. It is alleged in the petition that petitioner was discharged on December 22, 1909, and he filed his petition herein, for reinstatement to the police force, on April 23, 1915. No reason is shown in the petition for his failure to seek relief from a discharge which he claims was unlawful, for a period of more than five years. It appears on the face of his petition that petitioner is guilty of laches.

In the case of Gusley v. City of Chicago, No. 21989, opinion filed January 8, 1917, this court said:

> "Petitioner was discharged from the service on September 3, 1913, but did not file his original petition for mandamus until July 1, 1914, and the present amended petition until April 17, 1915. It has been held that a delay of six months in filing such a petition amounts to laches, and that laches, when shown, is a sufficient defense. Kenneally v. City of Chicago, 220 Ill. 485; Schultheis v. City, 240 Ill. 167; Clark v. City, 233 Ill. 113."

The Circuit court erred in overruling the demurrer filed by respondent to the petition, and for such error the judgment of that court is reversed and the cause is remanded with directions to enter an order sustaining the demurrer of the respondent, City of Chicago, and dismissing the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

It is asserted in the petition that the petitioner's rights depend in some measure upon municipal ordinances. These ordinances were not set out in the petition in haec verba or in substance. It is elementary that the courts will not take judicial notice of the provisions of municipal ordinances, and that the only is implied upon petitions relying on such ordinances to allege and prove them. People v. Burke, 248 Ill. 16, 17.

Put aside from these and other questions raised by the demurrer which are overruled, the petitioner is not entitled to the relief prayed for in his petition. It is alleged in the petition that petitioner was discharged on December 22, 1920, and he filed his petition herein, for reinstatement to the police force, on April 23, 1919. No reason is shown in the petition for his failure to seek relief from a disciplinary action he claims was unlawful, for a period of more than five years. It appears on the face of his petition that petitioner is guilty of laches.

In the case of Lawlor v. City of Chicago, No. 21988, opinion filed January 4, 1917, this court said:

> "petitioner was discharged from the service on September 3, 1913, but did not file his original petition for mandamus until July 1, 1915, and the present amended petition until April 17, 1916. It has been held that a delay of six months in filing such a petition amounts to laches, and that laches, when shown, is a sufficient defense. Kennedy v. City of Chicago, 4[illegible] Ill. 488; Johnstedale v. Cook, 7[illegible] Ill. 197; Clark v. Dick, 227 Ill. 112."

The circuit court sound in sustaining the demurrer filed by respondent to the petition, and for such error the judgment of that court is reversed on the cause is remanded with direction to enter an order sustaining the demurrer of the respondent, City of Chicago, and dismissing the petition.

449 - 23794

ADAM GUTHORLE,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY and
CHICAGO CITY RAILWAY COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 390

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of plaintiff for the sum of $5,000.

Plaintiff brought his suit against Chicago Railways Company, Chicago City Railway Company and Chicago Surface Lines for damages arising from injuries which it is alleged plaintiff sustained while he was attempting to board a street car at Elston and Kedzie avenues, Chicago, on February 16, 1914. The suit was dismissed as to the Chicago Surface Lines.

The first count of the declaration, which consisted of three counts, charged that the defendants "negligently and carelessly managed, controlled and operated said car at a time when plaintiff in the exercise of ordinary care for his own safety was in the act of boarding said car at or near said intersection," etc. The second count charged that defendants "negligently and carelessly, suddenly without warning started said car in a forward direction at a time when plaintiff in the exercise of due care for his own safety was then and there in the act of boarding said car," and in the third count it was charged that plaintiff in pursuance of an invitation extended to him by defendants "was then and there in the act of boarding said car when defendant negligently and carelessly, suddenly without warning started said car in a forward direction while plain-

440 - 23794

ADAM GUTHORIE,
Appellee,

vs.

CHICAGO RAILWAY COMPANY and
CHICAGO CITY RAILWAY COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of plaintiff for the sum of $8,000.

Plaintiff brought his suit against Chicago Railways Company, Chicago City Railway Company and Chicago Surface Lines for injuries he received while in its alleged physically overcrowded motor car on the morning of the second of March, 1914. He said in his evidence, that he was a school teacher, and was on his way to the Chicago Normal School.

At least twice of the last [illegible], motor car stopped at three corners, allowed back for passengers to alight and at some time [illegible] to the crowdedness of the car, he was at a time when [illegible] of the car at Western avenue and Lake street, [illegible] the car was [illegible] and [illegible] the car. The ground count charged that defendants [illegible] negligently and carelessly, suddenly without warning, [illegible] car in a [illegible] manner at a time when plaintiff was [illegible] of the car for his own safety was [illegible] in the act of [illegible] manner, and in the [illegible] of the [illegible] fall in pursuance of the transaction existing [illegible] by defendants "was then and there [illegible] of boarding said car [illegible] when defendant negligently, and carelessly, suddenly ordered [illegible] warning starting said car in a [illegible] manner while plain-

tiff then and theretofore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination; by reason of the negligence and carelessness of defendants as aforesaid, plaintiff while in the act of boarding said car was then and there thrown," etc.

Plaintiff, a man about 53 years of age and weighing 230 pounds, at 6:30 P. M. on the day in question attempted to board the rear end of a north bound Kedzie avenue street car, which had stopped at Elston avenue to take on and let off passengers. Kedzie avenue is a north and south street and Elston avenue extends northwest and southeast. The weather was cold at the time of the accident.

There is much dispute in the evidence as to whether the plaintiff had attempted to board the car before or after it started; but however this may be, it is clear that he was injured while the car was moving upon the curve track from Elston avenue into Kedzie avenue.

It is insisted on behalf of defendant that the court erred in giving and refusing to give certain instructions; that there was werror in the rulings on the evidence and that the damages are excessive. We think the 9th instruction given to the jury is subject to the criticism made of it by counsel for defendants. This instruction told the jury that if the plaintiff got on the car in question, or was in the act of boarding the same while it was standing still, it became the duty of defendants to do all that human care, vigilance and foresight could reasonably do, etc., to prevent an accident to the plaintiff while he was riding upon said car or going upon the same while it was standing still, and the jury were told that if defendants failed to use such care and diligence and that thereby injury befell the plaintiff, the plaintiff could recover.

tiff then and therefore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination; by reason of the negligence and carelessness of defendants as aforesaid, plaintiff while in the act of boarding said car was then and there thrown," etc.

Plaintiff, a man about 55 years of age and weighing 230 pounds, at 8:30 P. M. on the day in question attempted to board the rear end of a north bound Vadsie avenue street car, which had stopped at Ulston avenue to take on and let off passengers. Vadsie avenue is a north and south street and Ulston avenue extends northwest and southeast. The weather was cold at the time of the accident.

There is much dispute in the evidence as to whether the plaintiff had attempted to board the car before or after it started; but however this may be, it is clear that he was injured while the car was moving upon the curve from Ulston avenue into Vadsie avenue.

It is insisted on behalf of defendant that the court erred in giving and refusing to give certain instructions; that there was error in the rulings on the evidence and that the damages are excessive. We think the 8th instruction given to the jury is subject to the criticism made of it by counsel for defendants. This instruction told the jury that if the plaintiff got on the car in question, or was in the act of boarding the same while it was standing still, it became the duty of defendants to do all that human care, vigilance and foresight could reasonably do, etc., to prevent an accident to the plaintiff while he was riding upon said car or going upon the same while it was standing still, and the jury were told that if defendants failed to use such care and diligence and that thereby injury befell the plaintiff, the plaintiff could recover.

The charge in the declaration and, as we read it, the only charge, is that the plaintiff was injured while he was in the act of getting upon the rear end of the street car. The case must be tried again, and in such circumstances we do not care to discuss the weight or character of the evidence heard on the trial. It is sufficient to say that the question of whether the plaintiff was injured while in the act of boarding the car, or whether he had got aboard the car and was thereafter thrown off as the rear end of the car swung around the curve tracks, were questions of fact for the determination of the jury; and if the jury were of opinion that plaintiff fell or was thrown from the car after he had become a passenger thereon, then there could be no recovery by plaintiff on the charges made in the declaration.

It is true that the third count of the declaration charges:

> "that plaintiff in pursuance of said invitation was then and there in the act of boarding said car when defendant negligently and carelessly, suddenly without warning started said car in a forward direction while plaintiff then and theretofore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination."

The statement in the above quotation that the plaintiff "was then and there a passenger on the rear platform of said car is not sufficiently definite in its meaning to control or modify the express charge of this count that the plaintiff was injured "while in the act of boarding said car." We think the instruction in question should have been limited to the cause of action stated in the declaration. The plaintiff could not recover if the fact be that plaintiff was thrown from the car after he had got safely thereon and while it was moving on the curve tracks from Elston

The charge in the declaration and, as we read it, the only charge, is that the plaintiff was injured while he was in the act of getting upon the rear end of the street car. The case must be tried again, and in such circumstances we do not care to discuss the weight or character of the evidence heard on the trial. It is sufficient to say that the question of whether the plaintiff was injured while in the act of boarding the car, or whether he had got aboard the car and was thereafter thrown off as the rear end of the car swung around the curve tracks, were questions of fact for the determination of the jury; and if the jury were of opinion that plaintiff fell or was thrown from the car after he had become a passenger thereon, then there could be no recovery by plaintiff on the charges made in the declaration.

It is true that the trial court of the declaration charges:

> "that plaintiff in pursuance of said invitation was then and there in the act of boarding said car when defendant negligently and carelessly, suddenly without warning started said car in a forward direction while plaintiff then and theretofore in the exercise of due care for his own safety was then and there a passenger on the rear platform of said car for hire to be carried to his destination."

The statement in the above quotation that the plaintiff "was then and there a passenger on the rear platform of said car is not sufficiently definite in its meaning to control or modify the express charge of this count that the plaintiff was injured "while in the act of boarding said car." We think the instruction in question should have been limited to the cause of action stated in the declaration. The plaintiff could not recover if the fact be that plaintiff was thrown from the car after he had got safely thereon and while it was moving on the curve tracks from Eaton

avenue into Kedzie avenue.

The declaration contains no charge of negligence in the operation of the car except that of suddenly starting it, and the plaintiff charges that this sudden starting or jerking caused him to fall. The instruction in question authorized the jury to return a verdict against defendants if the jury believed that the defendants failed to protect plaintiff after he got upon and while he was riding upon the car. To instruct the jury with reference to a failure to perform a duty, a breach of which is not charged in the declaration, is error. Chicago & Alton Ry. Co. v. Robinson, 106 Ill. 142.

In Lyons v. Ryerson & Son, 242 Ill. 409, 417, the Supreme court held that there could be no recovery in a case for injuries caused by the negligent conduct of a defendant where such negligence was not charged in the declaration, and this, even though there was evidence tending to show such negligence; and in deciding the case the court said:

> "The conclusion that we have reached will require a retrial of this cause, and hence we should not give an opinion as to the weight of the evidence. It is manifest, however, from what has been stated, that under repeated decisions of this court the evidence was so conflicting that it was particularly important that the instructions should be accurate."

We think that the court erred in refusing to give defendant's tendered instruction No. 2. This instruction informed the jury that "if the plaintiff boarded the car safely and that he was caused to fall because of the manner in which the car was operated around the curve, and not because of the manner in which it was started, or operated while he was boarding it, then your verdict must be not guilty. This instruction in another form presents the same question that has been discussed.

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In Lyons v. Everson & Son, 242 Ill. 428, 431, the Supreme court held that there could be no recovery in a case for injuries caused by the negligent conduct of a defendant where such negligence was not charged in the declaration, and this, even though there was evidence tending to show such negligence; and in deciding the case the court said:

> "The conclusion that we have reached will require a retrial of this cause, and hence we should not give an opinion as to the weight of the evidence. It is sufficient, however, from what has been stated, that under repeated decisions of this court the evidence was so conflicting that it was particularly important that the instructions should be accurate."

We think that the court erred in refusing to give defendant's tendered instruction No. 2. This instruction informed the jury that "if the plaintiff boarded the car safely and that he was caused to fall because of the manner in which the car was operated around the curve, and not because of the manner in which it was started, or operated while [illegible] boarding it, then your verdict must be not guilty." This instruction in another form presents the same question that has been discussed.

There was evidence heard from which the jury might conclude that the defendant fell from the car after it had started and after he got safely thereon, and if the jury did so conclude, then the plaintiff could not have recovered against the defendants for injuries so received even though caused by the negligence of defendants. Lake St. El. R. R. Co. v. Shaw, 203 Ill., 39, 42.

The evidence heard upon the trial was very close as to what happened at and just before the time of the accident. Certain testimony would if believed lead to the belief that the rear end of the platform was so crowded at the time the car started that it was impossible for plaintiff to get upon the car. The jury should have been carefully and accurately instructed with reference to the law applicable to the case.

Under the circumstances of the case, we think that the giving of instruction No. 11 relating to the subject of damages was error. The jury were informed by this instruction that in estimating damages they were to consider:

> "All the facts and circumstances as shown by the evidence as to the nature and extent of the plaintiff's physical injuries, if any, his suffering in body, if any, resulting from such physical injuries and also such future suffering and loss of health, if any, as the jury may believe from the evidence and under the instructions from the court he has sustained or will sustain by reason of such injuries, his loss of time and inability to work, if any, resulting from such injuries."

This instruction in express language told the jury that they might assess damages to the full extent of plaintiff's physical injuries, etc., and were not confined to such injuries as were caused by the accident.

There was some evidence introduced on the trial which tended to prove that the plaintiff's physical condition at the time of the trial was caused by his own negli-

There was evidence heard from which the jury might conclude that the defendant fell from the car after it had started and after he got safely thereon, and if the jury did so conclude, then the plaintiff could not have recovered against the defendants for injuries so received even though caused by the negligence of defendants. Lake St. R. R. Co. v. Shaw, 208 Ill., 89, 92.

The evidence heard upon the trial was very close as to what happened at and just before the time of the accident. Certain testimony would if believed lead to the belief that the rear end of the platform was so crowded at the time the car started that it was impossible for plaintiff to get upon the car. The jury should have been carefully and accurately instructed with reference to the law applicable to the case.

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> "All the facts and circumstances as shown by the evidence as to the nature and extent of the plaintiff's physical injuries, if any, his suffering in body, if any, resulting from such physical injuries and also such future suffering and loss of health, if any, as the jury may believe from the evidence and under the instructions from the court be the natural or will sustain by reason of such injuries, his loss of time and inability to work, if any, resulting from such injuries."

This instruction in express language told the jury that they might assess damages to the full extent of plaintiff's physical injuries, etc., and were not confined to such injuries as were caused by the accident.

There was some evidence introduced on the trial which tended to prove that the plaintiff's physical condition at the time of the trial was caused by his own negli-

gent conduct.

In C. U. T. Co. v. Miller, 212 Ill. 49, the Supreme Court said:

> "If, as contended by the plaintiff, she was in a diseased and disabled condition, it was improper for the jury to take that condition into consideration unless that condition was shown by the evidence to have resulted from this accident. If such a condition was shown to exist, the jury were authorized by this instruction to consider it in estimating the damages, while under the law they should not have considered such condition unless the evidence went further and showed that such condition resulted from the accident, and while it is true that other instructions advised them that she could recover no damages except such damages as resulted from the accident, still this instruction directed them, in estimating the amount of such damages, to consider her present physical condition, as shown by the evidence, from which the jury could not conclude that they were authorized to consider her present physical condition as resulting from the accident."

It appears in the Miller case, supra, that an instruction substantially similar to the one under consideration was held objectionable even though in that case other instructions advised the jury that plaintiff could recover no damages except such as resulted from the accident. In the instant case no instruction was given which tended to correct the error complained of.

In view of what has been said it will be unnecessary to determine other questions presented by the briefs of counsel.

The judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

gent conduct.

In C. H. T. Co. v. Miller, 212 Ill. 49, the Supreme Court said:

"If, as contended by the plaintiff, she was in a diseased and disabled condition, it was improper for the jury to take that condition into consideration unless that condition was shown by the evidence to have resulted from this accident. If such a condition was shown to exist, the jury were authorized by this instruction to consider it in assessing the damages, while under the law they should not have considered such condition unless the evidence went further and showed that such condition resulted from the accident. and while it is true that other instructions advised them that she could recover no damages except such damages as resulted from the accident, still this instruction directed them, in estimating the amount of such damages, to consider her present physical condition, as shown by the evidence, from which the jury could not conclude that they were authorized to consider her present physical condition as resulting from the accident."

It appears in the Miller case, supra, that an instruction substantially similar to the one under consideration was held objectionable even though in that case other instructions advised the jury that plaintiff could recover no damages except such as resulted from the accident. In the instant case no instruction was given which tended to correct the error complained of.

In view of what has been said it will be unnecessary to determine other questions presented by the briefs of counsel.

The judgment of the superior court will be reversed and the cause remanded to that court for a new trial.

JOHN [illegible] ADAMS,
GEORGE H. [illegible].

545 - 23890

211 I.A. 393

SOUTH PARK COMMISSIONERS,
a corporation,
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, South Park Commissioners, a corporation, brought suit in the Municipal court of Chicago against the Chicago City Railway Co., a corporation, to recover the cost of paving and repairing the four street and boulevard intersections following:

East 47th Street and Grand Blvd.
East 22nd Street and So. Michigan Ave.
East 35th Street, Grand Blvd. and South Park Ave.
East 35th Street and Michigan Ave.

The case was tried by the court without a jury and judgment was entered in favor of the plaintiff for the sum of $1,857.20, being the amount expended by plaintiff for paving and repairing the intersections of 35th street and Michigan boulevard and 35th street and South Park avenue. The appeal to this court was perfected by plaintiff and defendant has assigned cross error.

Plaintiff's claim to be reimbursed for the cost of paving the four street intersections is based upon certain ordinances passed by plaintiff, a municipal corporation, and accepted by defendant. An ordinance passed May 11, 1892, permitted defendant to operate a double track street railway across the intersections of 47th street with Grand boulevard and Michigan avenue, on condition that the defendant should pave the space between its rails and for 12 feet on each side of the outer rails of said tracks with granite blocks,

543 - 23820

SOUTH PARK COMMISSIONERS,
a corporation,
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

21 I.A. 393

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

The plaintiff, South Park Commissioners, a corporation, brought suit in the Municipal court of Chicago against the Chicago City Railway Co., a corporation, to recover the cost of paving and repairing the four street and boulevard intersections following:

East 47th street and Grand Blvd.
East 44th street and So. Michigan Ave.
East 35th street, Grand Blvd. and South Park Ave.
East 35th street and Michigan Ave.

The case was tried by the court without a jury and judgment was entered in favor of the plaintiff for the sum of $1,857.20, being the amount expended by plaintiff for paving and repairing the intersections of 35th street and Michigan boulevard and 35th street and South Park avenue. The appeal to this court was perfected by plaintiff and defendant has assigned cross error.

Plaintiff's claim to be reimbursed for the cost of paving the four street intersections is based upon certain ordinances passed by plaintiff, a municipal corporation, and accepted by defendant. An ordinance passed July 11, 1892, permitted defendant to operate a double track street railway across the intersections of 47th street with Grand boulevard and Michigan avenue, on condition that the defendant should pave the space between its rails and for 12 feet on each side of the outer rails of said tracks with granite blocks

and that defendant should also pave the entire driveway of the intersection with granite or brick paving blocks at any time when directed by plaintiff. This ordinance among other things provided that the permission granted thereunder was revocable at any time by plaintiff.

The ordinance passed June 8, 1898, permitted defendant company to lay down its tracks and operate its street railway along 35th street and across Michigan avenue and South Park avenue, the two latter being boulevards under the control of plaintiff. Section 2 of this ordinance provided:

> "The roadway shall be placed in perfect order and condition at the expense of said Chicago City Railway Company and to be so kept by it at all times in such manner as shall be directed by the superintendent of the South Park Commissioners, and * * * said Railway company shall pave the space between the rails and on each side of its tracks extending to the curb and cross walks * * * with granite blocks or such other material as the South Park Commissioners may determine and direct; * * * and shall maintain such pavement in good condition."

Other sections of the ordinance regulate the use of the intersections by defendant, and in Section 8 it was provided that "the permission hereby granted is subject to such further order or other restrictions as the South Park Commissioners, or their successors, may from time to time deem advisable." Section 12 of the ordinance provided that the ordinance was to be in force from and after its written acceptance by defendant. The defendant accepted this ordinance in writing the day after its passage.

On October 4, 1906, the plaintiff passed an ordinance under which the defendant company was permitted to operate its street railways across the intersection of South Michigan avenue and 22nd street. This ordinance provided that the permission granted to defendant was "to be subject to such further and other restrictions as the commissioners may from time to time deem advisable." Paragraph 2 of section 2 of the

and that defendant should also pave the entire driveway of the intersection with granite or brick paving blocks at any time when directed by plaintiff. This ordinance among other things provided that the permission granted thereunder was revocable at any time by plaintiff.

The ordinance passed June 4, 1898, permitted defendant company to lay down its tracks and operate its street railway along 55th street and across Michigan avenue and South Park avenue, the latter being conveyed under the control of plaintiff. Section 3 of this ordinance provided:

> "The roadway shall be placed in perfect order and condition at the expense of said Chicago City Railway Company and to be so kept by it at all times in such manner as shall be directed by the superintendent of the South Park Commissioners, and said Chicago City Railway Company shall pave the space between the rails and on each side of the tracks extending to the curb and cross walks with granite blocks or such other material as the South Park Commissioners may determine and direct, and shall maintain such pavement in good condition."

Other sections of the ordinance regulate the use of the intersections by defendant, and in section 5 it was provided that "the permission hereby granted is subject to such further order or other restrictions as the South Park Commissioners, or their successors, may from time to time deem advisable." Section 14 of the ordinance provided that the ordinance was to be in force from and after its written acceptance by defendant. The defendant accepted the ordinance in writing the day after its passage.

On October 6, 1899, the plaintiff passed an ordinance under which the defendant was permitted to operate its street railway across the intersection of South Michigan avenue and 22nd street. This ordinance provided that the permission granted to defendant was "to be subject to such further and other restrictions as the Commissioners may from time to time deem advisable." Paragraph 2 of section 4 of the

ordinance provided that the defendant when so directed was to pave the entire surface of each boulevard intersection under the control of plaintiff and crossed by defendant's tracks with material and in a manner indicated by plaintiff, and maintain said intersections in good condition and repair to the satisfaction of plaintiff.

The ordinance also provided that in case defendant "should at any time fail or neglect to make the repairs ordered by the said commissioners within the time and in the manner named by said commissioners, said commissioners may immediately without notice proceed to make such repairs and said company shall pay said commissioners the cost thereof on demand."

In compliance with the express requirements thereof the defendant accepted this ordinance in writing on October 6, 1906, in which acceptance the defendant agreed to do and perform each and all of the matters and things required of it by the ordinance. Notwithstanding its written acceptance of the ordinances in question and its use of the privileges conferred by them, the defendant company insists that it is not liable to plaintiff for the costs incurred by plaintiff in paving and repairing the intersections in question.

In considering the questions presented by this appeal it should be constantly kept in mind that we are dealing with ordinances which express the terms of contracts between the parties and under which the defendant has laid down its tracks and operated its railway lines across certain boulevards under the control of plaintiff. The facts involved in the case are not in dispute. The defendant company had a prior right, under certain ordinances passed by the City Council of the City of Chicago, to operate, and prior to October 4, 1906, it was operating, cars on tracks laid down

ordinance provided that the defendant when so directed was to pave the entire surface of each boulevard intersection under the control of plaintiff and crossed by defendant's tracks with material and in a manner indicated by plaintiff, and maintain said intersections in good condition and repair to the satisfaction of plaintiff.

The ordinance also provided that in case defendant "should at any time fail or neglect to make the repairs ordered by the said commissioners within the time and in the manner named by said commissioners, said commissioners may immediately without notice proceed to make such repairs and said company shall pay said commissioners the cost thereof on demand."

In compliance with the express requirements therein of the defendant accepted this ordinance in writing on October 6, 1908, in which acceptance the defendant agreed to do and perform each and all of the matters and things required of it by the ordinance. Notwithstanding its written acceptance of the ordinance in question and its use of the privileges conferred by them, the defendant company insists that it is not liable to plaintiff for the costs incurred by plaintiff in paving and repairing the intersections in question.

In considering the questions presented by this appeal it should be constantly kept in mind that we are dealing with ordinances which express the terms of contracts between the parties and under which the defendant has laid down its tracks and operated its railway lines across certain boulevards under the control of plaintiff. The facts involved in the case are not in dispute. The defendant company had a prior right, under certain ordinances passed by the City Council of the City of Chicago, to operate, and prior to October 6, 1908, it was operating cars on tracks laid down

on certain of the streets in question. The right of the defendant to operate cars in 22nd street was acquired before Michigan avenue passed as a boulevard under the control of plaintiff. It also seems to be conceded that plaintiff, since the year 1898, has not had control of 35th street between the west line of Michigan avenue and the lake, except as to the intersection of said 35th street with Michigan avenue and South Park avenue.

In Chicago City Railway Co. v. South Park Commissioners, 257 Ill. 602, it was held that the city had the sole power to authorize the construction of a street railway line along a public street and across boulevards under the jurisdiction of park commissioners, and that while such commissioners had no power to prohibit the use of such intersections for street railway purposes, they did have the power to impose such reasonable restrictions as would tend to preserve the use of the intersections for boulevard purposes; that the restrictions must be reasonable and made with a due regard to the rights of the commissioners and the company, and that the commissioners could not, by imposing unreasonable restrictions, prevent the construction of street railway lines across boulevards and thereby do indirectly what they could not do directly. This case does not go to the extent of permitting a street railway company to cross boulevards and pleasure driveways within the jurisdiction of the commissioners without the consent of such commissioners; and it is therein very clearly laid down that the commissioners have the power to impose reasonable restrictions upon railway companies who propose to occupy such intersections with street railway tracks.

In the instant case, however, we have facts essentially different from those before the Supreme court in

on certain of the streets in question. The right of the defendant to operate cars in each street was acquired before Michigan avenue passed as a boulevard under the control of plaintiff. It also seems to be conceded that plaintiff, since the year 1892, has not had control of 35th street between the west line of Michigan avenue and the lake, except as to the intersection of said 35th street with Michigan avenue and South Park avenue.

In Chicago City Railway Co. v. Board Lake Commissioners, 157 Ill. 6-8, it was held that the city had the sole power to authorize the construction of a street railway line along a public street and across boulevards under the jurisdiction of park commissioners, and that while such commissioners had no power to prohibit the use of such intersections for street railway purposes, they are have the power to impose such reasonable regulations as would tend to preserve the use of the intersections for boulevard purposes; that the restrictions must be reasonable and made with a due regard to the rights of the commissioners and the company. Was that the commissioners could not, by imposing unreasonable restrictions, prevent the construction of street railway lines across boulevards and in park so in fact they could not do it directly. This case [illegible] the extent of permitting a street railway to cross [illegible] boulevards and pleasure driveways within the jurisdiction of the commissioners without the consent of such commissioners; and it is therefore very clearly held that the Lake Commissioners have the power to impose reasonable restrictions upon railway companies and power to compel such a reasonable [illegible] tions with street railway tracks.

In the instant case, however, we have facts essentially different from those before the supreme court in

the case cited. Here the parties themselves have assumed to determine what restrictions would or would not be reasonable under the circumstances. The ordinances passed by the plaintiff permit the use of the boulevard intersections, but under restrictions which the defendant company expressly agreed to.

The evidence does not show, nor is it argued that plaintiff had denied to defendant the right to operate its railway lines at the points in question. While the ordinances seem to contain provisions which in the absence of an agreement could not be imposed upon defendant, and while also there may be some question as to the right of plaintiff, without sufficient cause, to revoke permission granted by the ordinances and to compel the defendant to cease to operate its railway lines at the intersections, many of the restrictions of and the obligations imposed by the ordinances cannot be said to be in fact unreasonable. But where, as in this case, the parties interested have agreed upon the terms upon which street railway lines are to be constructed and operated at certain places, the courts will not interfere unless it appears that the execution of the contracts was the result of duress, or where the terms and restrictions imposed are manifestly so unreasonable as to shock one's sense of justice and fairness.

It is insisted that the defendant company had no power under its charter and the laws of the State to enter into a contract with plaintiff to improve and maintain the intersections in question; that this duty rests upon plaintiff and that it cannot shift the burden thereof to defendant; that the defendant had no power to assume such obligations except as it may be imposed by the City of Chicago in consideration of a grant by the city of the right to occupy and use the city streets.

the case cited. Here the parties themselves have assumed to determine what restrictions would or would not be reasonable under the circumstances. The ordinances passed by the plaintiff permit the use of the boulevard intersections, but under restrictions which the defendant company expressly agreed to.

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It is insisted that the defendant company had no power under its charter and the laws of the State to enter into a contract with plaintiff to improve and maintain the intersections in question; that this duty rests upon plaintiff and that it cannot shift the burden thereof upon defendant; that the defendant had no power to assume such obligations, except as it may be imposed by the city of Chicago in consideration of a grant by the city of the right to occupy and use the city streets.

In the case cited, Chicago City Railway Co. v. South Park Commissioners, 257 Ill. 602, it was held that the plaintiff had no power to authorize or prohibit the use of street or boulevard intersections, but that it did have the power to impose reasonable restrictions upon a public service corporation which desired to make use of them. The act which created the Board of South Park Commissioners provided in substance that the Board was to have exclusive control "to manage and direct said park * * * and generally in regard to said park they shall possess all the power and authority now by law conferred upon or possessed by the common council of the city of Chicago in respect to public squares and places in said city." (Private Laws of Illinois, 1869, vol. 1, page 364). This act was amended in 1879 as follows:

> "Such park boards shall have the same power and control over the parts of streets taken under this act as are or may be by law vested in them of and concerning the parks, boulevards or driveways under their control."
> (Hurd's Revised Statutes Ill. 1916, ch. 105, p. 1850.)

The cases decided by the Supreme court, in which questions as to the power of the South Park Commissioners were involved, generally hold that the control of plaintiff over the boulevards is the same as that of the City of Chicago over the streets and other public places in the city. McCormick v. South Park Commissioners, 150 Ill. 516, at 522-28; Barber Paving Co. v. Park Commissioners, 233 Ill. 362, 365; People v. South Park Commissioners, 221 Ill. 522.

In the case of Chicago City Railway Co. v. South Park Commissioners, supra, it was held that the city's control of intersections did not include the power to disregard their uses and purposes as parts of the park system,

In the case cited, Chicago City Railway Co. v. South Park Commissioners, 287 Ill. 272, it was held that the plaintiff had no power to authorize or prohibit the use of street or boulevard intersections, but that it did have the power to impose reasonable restrictions upon a public service corporation which operated a street car line. The act which created the South Park Commissioners provided in substance that the Board was to have exclusive control "to manage and direct said park * * * and generally in regard to said park they shall possess all the power and authority now by law conferred upon or possessed by the common council or the city of Chicago in respect to public squares and places in said city." (Private Laws of Illinois, 1869, vol. 1, page 364). This act was amended in 1879 as follows:

> "Said park boards shall have the same power and control over the parts of streets taken under this act as are or may be by law vested in them of and governing the parks, boulevards or driveways under their control."
>
> (Hurd's Revised Statutes Ill. 1913, ch. 105, par. 165.)

The cases decided by the Supreme Court, in which questions as to the power of the South Park Commissioners were involved, generally held that the control of plaintiff over the boulevards is the same as that of the City of Chicago over the streets and other public places in the city. Rodgers v. South Park Commissioners, 15 Ill. App. 462, at 466-68; Harper Irving Co. v. Park Commissioners, 255 Ill. 382, 385; Ingle v. South Park Commissioners, 21 Ill. App. 1.

In the case of Chicago City Railway Co. v. South Park Commissioners, supra, it was held that the plaintiff's control of intersections did not include the power to determine their uses and purposes as part of the park system.

and while this case holds that plaintiff had no power to prevent the use of such intersections by defendant, it, plaintiff, did have ample authority to impose reasonable restrictions upon such use. Stated differently, it may be said that the defendant company had no right under the law to occupy and use the intersections in question in disregard of such reasonable restrictions as plaintiff might impose. Both the City of Chicago and South Park Commissioners are municipal corporations, created by the sovereign power of the State for the purpose, inter alia, of controlling and governing the use of streets, highways and public places in the interest of the whole people. Where highways under the exclusive control of each of these public agencies cross and intersect each other, the jurisdiction and control of such intersection resides within the joint jurisdiction of such corporations, and the duty of each is to so exercise its jurisdiction therein as not unreasonably to interfere with the purposes which the legislature evidently had in mind when control of the streets, highways and public places was separately vested in these governing agencies, and it is our opinion that, even in cases where no valid contract ordinance is involved, the plaintiff has the right, where a street railway company refuses to comply with reasonable restrictions, to prevent its use of intersections under plaintiff's jurisdiction.

Much evidence was introduced on the trial which tended to prove that the restrictions imposed upon defendant, and which it agreed to accept and perform, were unreasonable. Witnesses testified in substance that the operation of heavy street cars over tracks on paved streets and the use thereof by heavily loaded wagons, the traffic of which used, to some extent that part of the street occupied by the track, tended

and while this case holds that plaintiff had no right to prevent the use of such interceptions by defendant, it, plaintiff, did have ample authority to impose reasonable restrictions upon such use. Stated differently, it may be said that the defendant company had no right under the law to deny and use the interceptions in question in disregard of such reasonable restrictions as plaintiff had fixed therein. Now the city of Chicago and other municipalities are particularly concerned in these questions, created by the appropriation of its streets for the purposes, inter alia, of cable lines and operating the use of its streets, alleyways and public places in the interest of the whole people. Where alleyways must be occupied [illegible] if such of these public agencies [illegible] telephone and other, the jurisdiction and control of such [illegible] within the joint jurisdiction of such [illegible], and the duty of such is to exercise its jurisdiction [illegible] unnecessarily to interfere with such uses, uses which the [illegible] have evidently had in mind when control of the streets, alleyways and public places was especially vested in these governing agencies. For, it is our opinion that, even in cases where no valid contract obtains, is implied, the plaintiff has the right, where a street railway company refuses to comply with reasonable restrictions, to prevent its use of [illegible] under plaintiff's jurisdiction.

Much evidence was introduced in the trial court tending to prove that the restrictions imposed upon defendant and which it refused to accept were unreasonable. Witnesses testified in substance that the operation of heavy street cars over tracks [illegible] by heavily loaded wagons, the traffic of [illegible], to such extent that part of the street occupied by the track, [illegible]

to disintegrate the paving. Other evidence was to the effect that heavy street traffic seeks the tracks in the street and that in turning out therefrom the street paving outside of the rails becomes worn and broken. These questions were disputed matters of fact in the trial court. The trial judge was evidently of the opinion that the paving restrictions imposed by the ordinances, under the circumstances, bore a reasonable relation to the benefits secured by the defendant under the ordinances.

In City of Chicago v. Newberry Library, 224 Ill. 330, it was held that the city had no power to compel abutting property owners to pay for the paving of a street which a street railway was bound to pay under the terms of an ordinance which was accepted by the company, and it was therein held that "while the contract remains in force the city could not provide for making the same improvements, although with different material, at the expense of the property owners."

We have been referred to other decisions in other States which sustain the contention that ordinances requiring street railway companies to pave and maintain roadways throughout the entire width are reasonable and valid. Borough of Rutherford v. Hudson River Traction Co., 73 N. J. L. 227; Philadelphia v. Ridge Avenue Passenger Ry. Co., 143 Pa. St.444; City of Philadelphia v. Thirteenth and Fifteenth Streets Passenger Railway Co., 169 Pa. St. 269. In the case at bar, however, the parties agreed to the terms and conditions of the ordinance.

In Kuehner v. City of Freeport, 143 Ill. 92, the Supreme court held that whether a railway should pay for paving between its tracks, as is sometimes done, less or more, rests in the discretion of the municipal authorities; and in

to disintegrate the paving. Other evidence was to the effect that heavy street traffic weaks the tracks in the street and that in turning out therefrom the street paving outside of the rails becomes worn and broken. These questions were disputed matters of fact in the trial court. The trial judge was certainly of the opinion that the paving restrictions imposed by the ordinances, under the circumstances, bore a reasonable relation to the benefits secured by the taxpayers under the ordinances.

In City of Chicago v. Lawndale Library, [illegible] 324, it was held that the city had no power to compel abutting property owners to pay for the paving of a street within a street railway and to pay under the terms of an ordinance which was adopted by the company, and it was decided that "with the constitutional question in [illegible] the city could not provide for making the same improvements, without with different material, at the expense of the property owners."

We have been referred to other decisions in other states which support the contention that ordinances requiring street railway or bridge to pave and maintain roadway throughout the entire width are reasonable and valid. Johnson [illegible] Rutherford v. Hudson River Traction Co., [illegible]; Philadelphia v. Trade Avenue [illegible] Co., [illegible]; City of Philadelphia v. Girard and Diamond Streets Passenger Railway Co., [illegible]. In the [illegible] However, the parties agreed to the terms [illegible] of the ordinance.

In Plummer v. City of Bridgeport, [illegible], the Supreme Court held that [illegible] a railroad company to pave between its tracks, as it [illegible] the [illegible] rests in the discretion of the municipal [illegible], and in

deciding the case of Madison v. Alton Traction Company, 235 Ill. 352, the court said:

> "Other cases might be cited where the provisions of ordinances requiring railroad companies occupying streets to pave and keep in repair certain portions of the streets have been sustained, and we have been referred to no case where they have been held invalid or not binding on the city and the railway company."

If it be conceded that the city and the plaintiff had the joint control and management of the intersections in question, it follows as a necessary consequence of this control that each municipality had the power, even without consent, to reasonably regulate the use of such intersections. Where, however, as in the instant case, the restrictions imposed are embodied in a contract to which both parties assent, the courts, in the absence of very clear evidence to the contrary, will assume that the provisions of the contract are reasonable. Chicago General Ry. Co. v. City of Chicago, 176 Ill. 253; Byrnes v. Chicago General Ry. Co., 169 Ill. 75.

The authority last cited holds that a municipal corporation by contract ordinance may impose upon public service corporations conditions and restrictions which would be invalid if required by a municipality in the exercise of its governmental function; and in Chicago City Railway Company v. South Park Commissioners, supra, the Supreme court said:

> "The commissioners and the company being unable to agree as to proper and reasonable conditions, it became the province of the court to determine whether the conditions sought to be imposed were reasonable or unreasonable."

In City of Springfield v. Central Union Telephone Co., 184 Ill. App. 400, it was held -

> "The question of the reasonableness of the grant was for the parties to decide. If the grantees in the ordinance were not satisfied with its terms they should have refused to accept it. * * * Having chosen to accept the ordinance with all of its terms, they are bound by it."

While we think there is force in the contention that the defendant is estopped by its acceptance of the or-

deciding the case of Yadkoski v. Alton Traction Company, 65

Ill. 352, the court said:

> "Other cases might be cited where the provisions of ordinances requiring railroad companies occupying streets to pave and keep in repair certain portions of the streets have been sustained, but we have been referred to no case where they have been held invalid or not binding on the city and the railway company."

It is to be concluded that the city and the plaintiff had the joint control and management of the intersections in question. It follows as a necessary consequence of this control that each municipality has the power, even without consent, to reasonably regulate the use of such intersections. There, however, as in the instant case, the restrictions imposed are embodied in a contract to which both parties consent, the courts, in the absence of very clear evidence to the contrary, will assume that the provisions of the contract are reasonable. Chicago General Ry. Co. v. City of Chicago, 176 Ill. 253; Hynes v. Chicago General Ry. Co., 188 Ill. 70.

The municipality has ordinarily the right to authorize corporation by contract ordinance may impose upon public service corporations conditions and restrictions which would be invalid if required by a municipality in the exercise of its governmental function; and in Chicago City Railway Company v. South Park Commissioners, supra, the Supreme Court said:

> "The commissioners and the company, being unable to agree as to proper compensation, submitted the case to the province of the court to determine whether the conditions sought to be imposed were reasonable or unreasonable."

In City of Aurora v. Central Illinois Light Co., 184 Ill. 4[illegible], it was held:

> "The question of the reasonableness of the contract was for the parties to decide. If the franchise in the ordinance were not satisfied with its terms, they would have refused to accept it. [illegible] having chosen to accept the ordinance with all its terms, they are [illegible] by it."

While we think it is proper in an action [illegible] that the defendant is estopped by its acceptance of the or-

dinances in question and by full performance and compliance of plaintiff with their requirements, we are of the opinion that the contract was not ultra vires either of plaintiff or defendant.

In Chicago General Railway Co. v. City of Chicago, 176 Ill. 253, the court said:

> "We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless, the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract."

Byrnes v. General Railway Co., 169 Ill. 82; Commonwealth Electric Co. v. Rose, 214 Ill. 545; People v. Suburban R.R. Co., 178 Ill. 606.

The evidence shows that the defendant for some years recognized the binding force of the contract which it entered into with the plaintiff. It paved many boulevard and street intersections for their entire width. The passage and acceptance of the ordinances in question and performance under them by both plaintiff and defendant rendered the transaction binding upon both parties thereto. There is ample reason based upon authority for a holding that certain of the terms and conditions imposed by the contracts were not in fact unreasonable. Other requirements of these ordinances, and in particular those which required the defendant to pave intersections distant from and not connected with intersections involved herein, might be regarded as unreasonable in the absence of acceptance thereof by the defendant.

The defendant bases its defense in part upon

dinances in question and by full performance and compliance of plaintiff with their requirements, we are of the opinion that the contract was not *ultra vires* under of plaintiff or defendant.

In *Chicago General Railway Co.* v. *City of Chicago*, 176 Ill. 253, the court said:

> "We are also of the opinion that even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was *ultra vires*, the city - not having the power to impose it, nevertheless, the consideration having been received by the company with the condition attached, permitting thereby to perform it, it became a valid contract between the city, the validity of which the plaintiff is now seeking to deny. The act of the city in granting the condition cannot be treated as a mere public policy or prohibited by statute, and void. But therefore, having accepted the contract in its entirety and received the benefits for which it agreed to pay the account stated, it cannot now repudiate that contract."

Byrne v. *General Railway Co.*, 180 Ill. [illegible], *Chicago City Railway Co.* v. *Chicago*, [illegible] Ill. 465; *Wabash* v. *Chicago Railway Co.*, 178 Ill. [illegible].

The [illegible] years preceding the burden [illegible] of the contract [illegible] entered into with the [illegible]. It [illegible] and street [illegible] in question [illegible] forbidden under them by [illegible] the [illegible] angle [illegible] of the [illegible] in fact [illegible] and in particular [illegible] interactions [illegible] tions involved [illegible] the absence of [illegible] by the [illegible].

"The defendant [illegible] in [illegible]

the case of Chicago City Ry. Co. v. South Park Commissioners, supra. Under this decision the defendant was not required to assent to any unreasonable conditions or restrictions. At the time the ordinances were passed and accepted it was a matter of uncertainty as to what restrictions might be imposed by plaintiff. The defendant saw fit to agree with plaintiff as to the terms and conditions of the ordinances and what was therefore uncertain became thereby certain. This fact furnished a sufficient legal consideration for the making of the contracts. The passage of the ordinances of 1907 by the City Council of the City of Chicago could not have had the effect of releasing the defendant from its prior obligations to plaintiff.

The plaintiff performed the work which was required of defendant under the contract at the intersections referred to. The evidence shows that the total reasonable cost of this work was $4,097.08.

The judgment of the Municipal Court will be reversed and judgment entered here in favor of the plaintiff for the sum of $4,097.08.

REVERSED AND JUDGMENT HERE.

the case of Chicago City Ry. Co. v. South Park Commissioners, supra. Under this decision the defendant was not required to assent to any unreasonable conditions or restrictions. At the time the ordinances were passed and accepted it was a matter of uncertainty as to what restrictions might be imposed by plaintiff. The defendant saw fit to agree with plaintiff as to the terms and conditions of the ordinances and what was therefore uncertain became merely certain. This fact furnished a sufficient legal consideration for the making of the contracts. The passage of the ordinances of 1907 by the City Council of the City of Chicago could not have had the effect of releasing the defendant from its prior obligations to plaintiff.

The plaintiff performed the work which was required of defendant under the contract at the intersections referred to. The evidence shows that the total reasonable cost of this work was $4,097.08.

The judgment of the municipal court will be reversed and judgment entered here in favor of the plaintiff for the sum of $4,097.08.

REVERSED AND JUDGMENT ENTERED.

66 - 23976

CHARLES B. NELSON,
Appellee,

vs.

OSCAR BRODFUEHRER et al.

On Appeal of OSCAR BRODFUEHRER.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 396

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior Court appointing a receiver.

~~The~~ bill of complaint ~~filed in the cause charged in substance that~~ Charles B. Nelson, complainant, which charged that he had recovered a judgment against the defendant, Oscar Brodfuehrer, for the sum of $265, ~~It charges the issuance and return nulla bona of~~ that an execution had been issued and returned nulla bona; ~~and~~ that said defendant was the owner of real estate, or of an interest therein, and of certain personal property; that the wife of defendant, who was also made a party defendant, held legal title to the property which was in fact the property of defendant. The bill sought discovery of the defendants, who filed answers denying in general terms the material allegations of the bill. On a preliminary hearing the court ordered the appointment of a receiver, upon the complainant and receiver giving bonds in accordance with the statute. From this order defendant appeals.

It is insisted for the defendant, the judgment debtor, who brings the case here for review, that the bill of complaint is not properly verified. The bill is verified by the complainant himself and also by his agent, and while the verification of complainant seems to have been attached to the bill, in compliance with an order of court, after it was filed, we think the bill was sufficiently verified.

66 - 25976

CHARLES H. WILSON,
Appellee,

vs.

OSCAR BROCKMEYER et al.

On Appeal of OSCAR BROCKMEYER.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

311 I. 396

MR. JUSTICE DYER DELIVERED THE OPINION OF THE COURT:

This is an appeal from an interlocutory order of the Superior Court appointing a receiver.

The bill of complaint filed in the same court by the complainant, Charles H. Wilson, against the defendant, Oscar Brockmeyer, for the sum of $[illegible], recovered a judgment against the defendant, Oscar Brockmeyer, for the sum of $[illegible], including the insurance and taxes paid upon the execution and that said defendant was the owner of real estate, or of an interest therein, and of certain personal property; that the wife of defendant, who was also made a party defendant, held legal title to the property which was in fact the property of defendant. The bill sought discovery of the defendants, who filed answers denying in general terms the material allegations of the bill. On a preliminary hearing the court ordered the appointment of a receiver, upon the complainant and receiver giving bonds in accordance with the statute.

It is insisted for the defendant, Mr. Brockmeyer, who brings the case here for review, that the bill of complaint is not properly verified. The bill is verified by the complainant in self and also by his agent, and while the verification of complainant seems to have been attached to the bill, in compliance with an order of court, after it was filed, we think the bill was sufficiently verified.

The point is made that the bill was unsigned at the time it was verified by the agent, and also when verified by complainant. No objection was made in the trial court, so far as the abstract of record shows, either by filing a demurrer or otherwise, to the sufficiency of the bill of complaint. The signature of complainant appears on the bill, and excepting the order referred to, nothing is shown as to when the bill was in fact signed. Answers were filed by the defendants and later on October 2, 1917, the court appointed a receiver for all of the defendant's, Oscar Brodfuehrer's, property except such as was exempt by law.

It is asserted that the receiver should not have been appointed for the reason that the answer filed by defendant definitely denied all the material allegations of fact of the bill, and it is insisted, on the authority of Salsbury v. Ware, 183 Ill. 505, that the bill should be dismissed for the reason that the sworn denial of defendants in their answer rendered the court powerless to appoint a receiver. We do not think that the case referred to is an authority in favor of the contention of defendant. That case merely indicates the amount of proof necessary to overcome a sworn answer where the answer is offered as proof upon a full hearing of the cause. The bill before us is a creditor's bill and it seeks a discovery of the assets and property owned by one of the defendants.

In Gage v. Smith et al., 79 Ill. 219, it was held that in cases of creditors' bills, where the existence of a judgment against a debtor and the return of execution unsatisfied are alleged, and it is also alleged, on information and belief, that the defendant has property, exclusive

The point is made that the bill was assigned at the time it was verified by the agent, and also when verified by complainant. No objection was made in the trial court, so far as the abstract of record shows, either by filing a demurrer or otherwise, to the sufficiency of the bill of complaint. The signature of complainant appears on the bill, and exceeding the order referred to, nothing is shown as to when the bill was in fact signed. Answers were filed by the defendants and later on October 2, 1917, the court appointed a receiver for all of the defendant's, Moore Producer's, property except such as was exempt by law.

It is asserted that the receiver should not have been appointed for the reason that the answer filed by defendant definitely denied all the material allegations of fact of the bill, and it is insisted, on the authority of Salsbury v. Kerr, 180 Ill. 628, that the bill should be dismissed for the reason that the sworn denial of defendants in their answer rendered the court powerless to appoint a receiver. We do not think that the case referred to is an authority in favor of the contention of defendant. That case merely indicates the amount of proof necessary to overcome a sworn answer where the answer is offered as proof upon a full hearing of the cause. The bill before us is a creditor's bill and it seeks a discovery of the assets and property owned by one of the defendants.

In Gage v. Smith et al., 78 Ill. 19, it was held that in cases of creditors' bills, where the existence of a judgment against a debtor and the return of execution unsatisfied are alleged, and it is also alleged, on information and belief, that the defendant has property, exclusive

of all prior claims, which complainant is unable to reach by execution, an injunction would issue and a receiver be appointed almost as a matter of course.

The charge made in the bill is that the defendant and his wife are concealing assets belonging to the defendant. The receiver is authorized, under the order of appointment, to take possession of such assets of the defendant only as are not subject to exemption. The order appointing the receiver was interlocutory and he is vested with authority to preserve whatever property may come into his possession as such receiver, pending a final determination of the issues by the master to whom the cause was referred, and by the court.

The order directing the appointment of a receiver required the giving of a bond by the receiver as well as by the complainant. The abstract of record shows that a bond given by the receiver was approved on October 3, 1917, and that the bond of complainant was approved October 23, 1917. There is no means of determining from the abstract when the above bonds were filed. The subsequent approval of the bond given by complainant did not vitiate the appointment of the receiver. The appointment was to be effective only by compliance with the order which required the filing of a bond by the receiver as well as by complainant. Both bonds having been given in compliance with the order of court, the right of the receiver to act as such became, thereby, complete.

The interlocutory order of the Superior Court of October 2, 1917, is affirmed.

ORDER AFFIRMED.

of all prior claims, which complainant is unable to reach by execution, an injunction would issue and a receiver be appointed almost as a matter of course.

The charge made in the bill is that the defendant and his wife are concealing assets belonging to the defendant. The receiver is authorized, under the order of appointment, to take possession of such assets of the defendant only as are not subject to exemption. The order appointing the receiver was interlocutory and he is vested with not only to preserve whatever property may come into his possession as such receiver, pending a final order in lieu of the issues by the master to whom the cause was referred, and by the court.

The order directing the appointment of a receiver required the giving of a bond by the receiver as well as by the complainant. The motion of receiver moves that a bond given by the receiver was approved on October 3, 1917, and that the bond of complainant was approved October 3, 1917. There is no means of determining from the abstract when the above bonds were filed. The abstract discloses that a bond given by complainant did not validate the appointment of the receiver. The appointment was to be effective only by compliance with the order which required the filing of a bond by the receiver as well as by complainant. Both have having been given in compliance with the order of court, the right of the receiver to act as such became, therefore, effective.

The interlocutory order of the appointment was of October 3, 1917, is affirmed.

[illegible]

85 - 23997

EDWARD STEER,
Appellee,

vs.

JULIUS OPPENHEIMER, doing business as J. Oppenheimer and Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 397

MR. JUSTICE DENEN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and obtained judgment for $489.06 in the Municipal court against the defendant for rent for the use of premises in Chicago from December 29, 1915, to February 29, 1916. Defendant appeals the cause to this court.

The defendant took possession of the premises on December 29, 1914, under a lease for a term ending April 29, 1915. He held over as tenant under the lease for two 4-month terms, the last of which ended December 29, 1915. The lessor under the original lease was one Edward Warhoefer.

The principal matter in dispute between the parties is as to whether the defendant was a lessee of the premises subsequent to December 29, 1915. It is a much disputed question of fact whether the defendant had abandoned the premises prior to December 29, 1915. It is conceded that certain articles which had been in the possession of defendant were in the premises after that date. The defendant's contention is that the articles left in the premises were not of great value, that they were not owned by him but were the property of persons who had loaned them to him. We think that his possession of the articles referred to, at and prior to December 29, 1915, even though he had no legal title thereto, gave him such control and proprietary interest therein as made it his right, and perhaps his duty, to preserve this property, and his occupation of the premises in question for this purpose must be held to be a use of the premises for his

EDWARD STERN,
Appellee,

vs.

JULIUS GINSBERGER, doing business as J. Oppenheimer and Company,
Appellant.

AGE AT FIRST INSTANCE.
COURT OF CHICAGO.

SILLA. 397

MR. JUSTICE DENIS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and obtained judgment for $1489.06 in the municipal court against the defendant for rent for the use of premises in Chicago from December 20, 1915, to February 29, 1916. Defendant appeals the case to this court.

The defendant took possession of the premises on December 20, 1914, under a lease for a term ending April 29, 1915. He held over as tenant under the lease for one 4-month term, the last of which ended December 29, 1915. The lessor under the original lease was one Edward Schroeder.

The principal matter in dispute between the parties is as to whether the defendant was a lessee of the premises subsequent to December 20, 1915. It is a much disputed question of fact whether the defendant had abandoned the premises prior to December 29, 1915. It is conceded that certain articles which had been in the possession of defendant were in the premises after that date. The defendant's contention is that the articles left in the premises were not of great value, that they were not owned by him and that the property of persons who had leased them to him. He claims that his possession of the articles referred to, ceased prior to December 29, 1915, even though he had no legal title thereto, gave him such control and proprietary interest in them as made it his right, and perhaps his duty, to preserve this property, and his occupation of the premises in question for this purpose must be held to be a use of the premises for his

benefit.

There is, however, a controlling fact shown by the evidence which leaves the question of defendant's relation to the premises in question after December 29, 1915, without much doubt. The evidence tends to prove that defendant attempted to rent the premises to Wolffs Bros. prior to December 29, 1915. It satisfactorily appears that he did in fact sublet the premises to them after that date and that he received as rental therefor the sum of $400. The defendant attempted to take the position on the trial that the person who made out the receipt for this payment, one Wager, a clerk employed by defendant, had no authority to do so. The defendant admits, however, that he took the check for $400.00 and deposited it to his account, although at the trial he was unable to tell why or on what account he received this money, and he testified: "I took it because he handed it to me; that is all there is to it."

A point is made that error was committed by reason of the ruling of the trial Judge excluding a deed which it is claimed would show a transfer of the title in fee to the premises to Jacob Wolffs, a member of the firm of Wolffs Bros. This partnership consisted of three members. Neither Jacob Wolffs nor the firm of Wolffs Bros. make any claim at all to any interest or right accruing to them, or either of them, under this deed. So far as this record is concerned, there can be no question made by the defendant here as to the right of the lessor and his assigns to the rents accruing under the lease. The defendant's contention is that he surrendered the premises to the owner of the fee. There is no merit at all in this contention. As a matter of fact the great preponderance of the evidence shows that the defendant at no time attempted to

benefit.

There is, however, a justifying fact shown by the evidence which leaves the question of defendant's relation to the premises in question after December 20, 1913, without much doubt. The evidence tends to prove that defendant attempted to rent the premises to Wolfe, Joe, prior to December 20, 1913. It satisfactorily appears that he did in fact sublet the premises to them after that date and that he received as rental therefor the sum of $[illegible]. The defendant attempted to take the position on the trial to the person who made out the receipt for this payment, one [illegible], a clerk employed by defendant, had no authority to do so. The defendant admits, however, that he took the [illegible] and deposited it to his account, although at the trial he was unable to tell by or on what account he received this money, and he testified: "I took it because he handed it to me; that is all there is to it."

A point is made that error was committed by reason of the ruling of the trial judge excluding a letter which it is claimed would show a transfer of the title in fee to the premises to Joe Wolfe. [illegible] of the firm of Wolfe Bros. This partnership consisted of three members, neither of the Wolfe bros the firm of Wolfe Bros. make any claim [illegible] to any interest or right accruing to them, or either of them, under this lease. So far as it is proved in evidence, there can be no [illegible] made by the defendant here as to the right of the [illegible] and his assigns to the title accruing under the lease. The defendant's contention is that he surrendered the premises to the owner of the fee. There is no merit at all in this contention. As a matter of fact the great preponderance of the evidence shows that the defendant at no time attempted to

surrender possession of the premises to Jacob Wolffs or to Wolffs Bros. The evidence is practically conclusive that he dealt with them and recognized them as his subtenants. Under the circumstances we think the trial court was right in excluding the deed. There is no force in the argument that the firm of Wolffs Bros. may have acquired an interest in the premises in question as owners through the deed to Jacob Wolffs, their assumed trustee. A member of this firm testified in the Municipal court that the firm was a subtenant of the defendant.

The plaintiff is entitled to interest on his claim. As we view the record, the defendant's position is untenable both in law and in fact. The delay in paying the rent was, to say the least, vexatious. The case involves more than the matter of mere delay; it was a refusal to pay rent for reasons which the evidence shows were resorted to for the sole purpose of delaying or defeating a just and meritorious claim.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

surrender possession of the premises to Jesse Wolfe or to Wolfe Bros. The evidence is practically conclusive that he dealt with them and recognized them as his subtenants. Under the circumstances we think the trial court was right in excluding the deed. There is no force in the argument that the firm of Wolfe Bros. may have acquired an interest in the premises in question as owners through the deed to Jesse Wolfe, their assumed bailee. A member of this firm testified in the Municipal court that the firm was a subtenant of the defendant.

The plaintiff is entitled to interest on his claim. As we view the record, the defendant's position is untenable both in law and in fact. He delay in paying the rent was, to say the lower, vexatious. The case involves more than the matter of mere delay; it was a refusal to pay rent for reasons which the evidence shows were resorted to for the sole purpose of delaying or defeating a just and meritorious claim.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

97 - 24013

GEORGE HUTTON,
Appellee,

vs.

ALBERT MILLER and E. P. MILLER, copartners, doing business as Albert Miller & Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 399

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of plaintiff, George Hutton, for the sum of $198.73.

The evidence introduced on the trial tends to prove that the plaintiff, a resident of Elkhorn, Wisconsin, in November, 1915, through his agent, R. J. McCabe, who was a brother-in-law of plaintiff, shipped two carloads of hay to defendants, who were engaged in a commission business in Chicago as Albert Miller & Company. R. J. McCabe had two bills of lading made out for the shipment, in which the name of the plaintiff appeared as the shipper of the hay. At the time of this transaction Andrew McCabe, a brother of R. J. McCabe, was conducting a hay brokerage business in Elkhorn, and he for some time had had business relations with defendant. R. J. McCabe delivered the bills of lading to Andrew McCabe with the request that they be sent to defendants. On November 24th Andrew McCabe sent the bills of lading to defendants and at the same time sent them the following letter:

"Elkhorn, Wis., 11-24-15.

Albert Miller & Co.

Sirs:

Car 74470 sent to you. Also car 103333. Call your attention to car 74470. This car is a very fine car of hay. All except about three tons at doors. Doors are bleached so sell those out and then sell the balance of car. It is good No. 1 Timothy hay. This has a sprinkle

CHARLES HUTTON,
Appellee,

vs.

ALBERT MILLER and . . .
MILLER, copartners, doing
business as Albert Miller
& Company,
Appellant.

[illegible] LAW.

COURT OF [illegible].

[illegible]

[illegible]

[illegible] JUSTICE DAVIS DELIVERED THE OPINION [illegible].

This is an appeal from a judgment of the municipal court of Chicago in favor of plaintiff, [illegible] for the sum of $198.75.

The evidence introduced on the trial serves to prove that the plaintiff, a resident of Kingston, [illegible], in November, 1920, through his agent, F. J. Cohen, who was a brother-in-law of plaintiff, acquired two varieties of hay, alfalfa and [illegible], which were shipped in a [illegible] to Albert Miller & Company. [illegible] bill of lading made out for the shipment, in which the name of the plaintiff appeared as the shipper of said hay. At the time of this transaction Andrew [illegible], a partner of [illegible], was conducting a hay brokerage business in Chicago, and for some time had business relations with defendant. F. J. Lombe delivered the bill of lading to Andrew Moreno with the request that they be sent to defendant. On November 4th, Moreno sent the bill of lading to defendant in Pendexter and to the same [illegible] [illegible] Albert Miller & Co.

Sirs:

Car 74470 sent to you. Also car [illegible]. [illegible] attention to car 74470. This car is a very fine car of hay. All except about three tons at top. [illegible] pleased to sell those car and then sell the balance of car. It is good No. 1 timothy hay. This was a springing car [illegible]

[illegible]

of clover. Poor hay at doors of this car also. So get into those cars. All we want is to get a fair deal.
Andrew McCabe."

On November 26, 1915, defendants acknowledged receipt of the bills of lading and also of the hay. Following this transaction Andrew McCabe sent other hay to defendants and drew drafts on them, which were honored. On December 15, 1915, the defendants, in a statement of account to Andrew McCabe, attempted to give him credit for the amount received by them on account of a sale of the hay in question, and on December 17th Andrew McCabe sent the following letter to defendants:

"Elkhorn, Wis. 12-17-1915.

Albert Miller & Co.

Sirs:
I enclose you draft and account on cars. You will notice that cars 74470 and car 103333 was shipped to you by George Hutton. So I have nothing to do with those two cars of hay. Send returns to George Hutton, Elkhorn, Wis.

Yours,
Andrew McCabe.

P. S. That balance due you will be made on some of my shipments."

It is insisted on behalf of the defendants that they had no knowledge at the time they received and sold the two carloads of hay that they were dealing with any person other than Andrew McCabe. It appears upon the face of the bills of lading which they received from him that the plaintiff, George Hutton, was the shipper of the goods in question. Andrew McCabe had done business with defendants both before and after the transaction in question, and they knew that he acted generally as the agent for farmers who through him had shipped hay to Chicago. It is not denied that the hay in question was owned and was in fact shipped by the plaintiff. The evidence shows that Andrew McCabe acted in the matter at the suggestion of R. J. McCabe and not by the express request of the plaintiff.

of clover. Door key at doors of this car also. We get into these cars. All we want is to get a fair deal.
Andrew McCabe."

On November 26, 1915, defendants acknowledged receipt of the bills of lading and also of the key. Following this transaction Andrew McCabe sent other keys to defendants and drew drafts on them, which were honored. On December 15, 1915, the defendants, in a statement of account to Andrew McCabe, stated to give him credit for the amount received by them on account of [illegible] in question, and on December 17th Andrew McCabe sent the following letter to defendants:

"Kinmore, Ala. 12-17-15.

Albert Miller & Co.

Gent:
I enclose you draft and account of cars. You will notice that cars 74470 and car 16239 was shipped to you by George Button. As I have nothing, I do with those two cars of hay. Send returns to George Button, Kinmore, Ala.

Yours,
Andrew McCabe.

P. S. That balance due you will be made on some of my shipments.

It is insisted on behalf of the defendants that they had no knowledge of the transactions between the two corporations of any that they were dealing with any person other than Andrew McCabe. It appears upon the face of the bills of lading, which they received, that [illegible] tiff, George Button, was the owner of the property [illegible] tion. Andrew McCabe and the business with defendants both before and after the transaction in [illegible] knew that he acted generally as the agent for [illegible] through him had shipped hay to Chicago. It is not [illegible] that the hay in question was raised and was at least [illegible] by the plaintiff. The evidence also shows [illegible] noted in the letter at the acquisition of [illegible] not by the express request of the plaintiff.

We do not think this case comes within the principles contended for by counsel for defendants. Under the facts shown by the record here it cannot be said that Hutton either "intentionally or negligently caused or permitted his agents to hold themselves out as the owners of the property." R. J. McCabe, who was in fact the agent of the plaintiff, had the bills of lading made out showing the shipper's name therein. His delivery of these bills to his brother with instructions to transmit them to defendant did not give Andrew McCabe such indicia of ownership to the property in question as would authorize the defendants to credit his account with the sum received from the sale of the hay.

In the instant case it does not appear that the money received from the sale of the hay was actually delivered to Andrew McCabe. An attempt was made to credit him with this amount and he promptly informed defendants of their error and called their attention to the fact that the hay was in fact the property of plaintiff.

In the case of Byers v. Johnson County Savings Bank, 64 Ill. App. 168, a case in material respects similar to the instant case, it was said:

> "It did not matter how the accounts were kept, if from the real circumstances a condition existed that stamped the transaction as one different from that which the account, as kept, might possibly be said to indicate. The real fact in such a case, when, as in this case, clearly proved, will control and prevail over the other theory, which the manner of keeping the accounts might tend to sustain. * * *
>
> "But the only reasonable conclusion from the evidence, which can be arrived at under the law, is that the hogs were the property of the appellee from the moment of their purchase to that of their sale. And that being so, the law will forbid appellants, into whose possession the hogs came, although they bore the outward semblance of being Elliott's property, from appropriating them upon a preexisting indebtedness of Elliott to them. * * *
>
> "The appellants parted with nothing on their faith and belief that the property belonged to Elliott, excepting the freight and charges paid by them and their own services, and for all which they were reimbursed, as they properly were entitled to be, by deducting the same from the gross receipts for which they sold the hogs."

We do not think this case comes within the principles contended for by counsel for defendants. Under the facts shown by the record here it cannot be said that "either intentionally or negligently caused or permitted his agents to hold themselves out as the owners of the property," C. J. McCabe, who was in fact the agent of the plaintiff, had the bills of lading made out showing the shipper name therein. His delivery of these bills to his creditor with instructions to transmit them to defendant did not give Andrew McCabe such indicia of ownership to the property in question as would authorize the defendants to credit his account with the sum received from the sale of the hay.

In this instant case it does not appear that the money received from the sale of the hay was actually delivered to Andrew McCabe. An attempt was made to credit him with this amount and he promptly informed defendants of their error and called their attention to the fact that the hay was in fact the property of plaintiff.

In the case of Lewis v. Lincoln County Trading Bank, 64 Ill. App. 168, a case in material respects similar to the instant case, it was said:

> "It did not matter how the accounts were kept. If from the real circumstances a conclusion exists that stamped the transaction as one different from that which the accounts, as kept, might justly be said to indicate, the real fact in such a case, even, as in this case, clearly proved, will control and prevail over the other evidence, which the manner of keeping the accounts might tend to establish. * * *
>
> "But the only possible conclusion from the evidence, which can be derived at on the trial, is that the hogs were the property of the appellee from the moment of their purchase to that of their sale. And that being so, the law will fetch any illegal, into which possession the hogs came, although they have the outward semblance of being illicitly in market, from which they can claim a protecting inviolateness of title in them. * * *
>
> "The appellants parted with nothing on their faith and belief that the property belonged to Illinois, save the freight and charges paid by them and their own services, and for all which they were reimbursed, so they properly were entitled to be, by deducting the same from the gross receipts

And it may be said here, as in the Byers case, supra, that the defendants had not in fact parted with anything of value because of their alleged belief that the hay in question was the property of Andrew McCabe. As against Hutton, the plaintiff, the defendants were, of course, entitled to their commissions and proper charges in connection with the sale of the hay. It was their duty to pay the net proceeds of the sale to the plaintiff, the owner of the property.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

And it may be said here, as in the _Lists_ case, _supra_, that the defendants had not in fact parted with anything of value because of their mistaken belief that the lady in question was the property of another person. As against Sutton, the plaintiff, the defendants were, of course, entitled to their possessions and proper charges in connection with the sale of the hay. It was their duty to pay the net proceeds of the sale to the plaintiff, the owner of the property.

The judgment of the [illegible] Court will be affirmed.

[illegible].

131 - 24050

KATHRYN J. McHALE,
Plaintiff in Error,

vs.

MARTIN J. McHALE,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 400

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce against her husband, ~~Martin J. McHale,~~ The bill was filed on the 4th day of October, 1915. The cause was tried before a jury and on November 16, 1917, the jury rendered a verdict in which it found the complainant not guilty of certain charges made against her in a supplemental cross bill filed by defendant, and found defendant guilty of extreme and repeated cruelty toward complainant and not guilty as to certain other charges made against him in the bill. The record discloses that a decree had been entered in the cause in favor of complainant on Fenruary 10, 1916. On March 2, 1916, the court entered an order in the following form:

> "On motion of solicitor for defendant, motion to vacate and set aside decree continued to March 8, 1916."

The decree of February 10, 1916, was vacated March 20, 1916. On November 26, 1917, the court, on motion of defendant, set aside the verdict of the jury entered November 16, 1917, and ordered a new trial of the cause.

The complainant, Kathryn J. McHale, by this writ of error contends that the court was without jurisdiction to set aside the decree of the court entered of record on February 10, 1916, at the February term of the court, in that it appears that the order setting this decree aside was entered of record on March 20, 1916, being the March

131 - 24000

KATHRYN J. HOWALD,
Plaintiff in error,

vs.

MARTIN E. HOWALD,
Defendant in error.

Error to Superior Court
of Cook County.

2 1 1 - 0 0

Mr. JUSTICE SCOTT DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for divorce against her husband, Martin E. Howald, on the 4th day of October, 1916. The cause was tried before a jury and on November 16, 1917, the jury rendered a verdict in which it found the complainant not guilty of certain charges made against her in a supplemental cross bill filed by defendant, and found defendant guilty of cruelty and recovered exactly covered complainant and her parents in a scandalous slander charges made against him in the bill. The charges contained in the cross bill had been released in the court of conciliation on February 1, 1916. [illegible] 1916, the court entered an order in the following manner:

"The motion of defendant for a new trial, to vacate and set aside decree entered March 6, 1916."

The decree of February 1, 1916, was [illegible] March 6, 1916. On November 6, 1917, the court [illegible] of defendant, and [illegible] November 16, 1917, and entered a new decree of the [illegible]

The complainant, Kathryn J. Howald, by her writ of error [illegible] the court and [illegible] tion to set aside the decree of the court [illegible] on February 1, 1916, on the ground [illegible] that it appears that the order [illegible] was entered of record on March 6, 1916, using the words

term of the court.

Numerous authorities are cited to the effect that the trial court had no power to vacate, alter or amend its decree, except in matters of form, on a motion entered at a term subsequent to that at which the decree was entered. The law on this question is well settled, but on the record before us it does appear that a motion was made within the February term to vacate the decree in question. Counsel for defendant argue that if the order had contained the words "made and" or "entered and" between the words "decree" and "continued", the jurisdiction of the court to vacate the decree might have been retained. We do not think there is much force in this argument. It appears from an order of court entered within the term that a motion had been made during the term to vacate the decree, and the order vacating the decree was entered March 20, 1916.

Although it is insisted that no motion to vacate the decree had ever been entered in the cause, we think the record conclusively shows to the contrary, and while the rules of the Superior court require that all motions not of course shall be made in writing, we are justified in assuming, in the absence of affirmative proof, that the parties had complied with the rules of the court at and before the time the order in question was entered.

The record shows the pendency of a motion to vacate the decree of March 2, 1916, and that this motion was continued for disposition to March 8, 1916. The order retained the jurisdiction of the court over the subject matter of the motion to the March term. The entry of the motion upon the record was sufficient notice to all concerned that such motion was pending and undisposed of. Hartman v. Viera, 133 Ill. App. 216.

term of the court.

Numerous authorities are cited to the effect that the trial court has no power to vacate, alter or amend its decree, except in matters of form, or a motion entered at a term subsequent to term at which the decree was entered. The law on this question is well settled, but on the record before us it does appear that a motion was made within the February term to vacate the decree in question. Counsel for defendant argue that if the order not containing the words "made and" or "entered nunc" between the words "decree" and "continued", the jurisdiction of the court to vacate the decree might have been retained. We do not think there is much force in such argument. It appears from an order of court entered within the term that "the motion and be a made during the term to vacate the decree, and the order vacating the decree was entered nunc pro tunc."

Although at the term the court had jurisdiction to vacate the decree and even upon entering in the order, we think the record conclusively shows to the contrary, we shall the ruling of the chancellor upon the motion to vacate, we shall indulge in presumptions in the absence of affirmative, or, if we are reviewing and compared the ruling of the court at the term of the time the order in question was entered.

The record shows the filing of a motion to vacate the decree at term A, 1909, and that the motion was continued for the entire term, 1909. The order recited the jurisdiction of the court over the subject matter of the motion in the order entry. Therefore, the motion upon the record was sufficient notice to all concerned that such motion was pending and undisposed of.

Between a term and the term next

The court did not, as insisted upon, abuse its discretionary power in granting a new trial. A court of review will interfere with the action of a trial court in granting a new trial only in cases where it appears that manifest injustice has been thereby done.

We are unable to say from our examination of the evidence heard on the trial that the trial court erred in awarding defendant a new trial, even if it be conceded that this court has the power to review the action of the trial court on the motion for a new trial of the cause. The cause will be retried and we do not wish to make any comment upon the weight of the evidence heard on the trial other than to repeat that we are unable to say that the chancellor erred in ordering a new trial of the cause. The writ of error is dismissed.

WRIT OF ERROR DISMISSED.

The court did not, as insisted upon, abuse its discretionary power in granting a new trial. A court of review will interfere with the action of a trial court in granting a new trial only in cases where it appears that manifest injustice has been thereby done.

We are unable to say from our examination of the evidence heard on the trial that the trial court erred in awarding defendant a new trial, even if it be conceded that this court has the power to review the action of the trial court on the motion for a new trial of the cause. The cause will be retained and we do not wish to make any comment upon the weight of the evidence heard on the trial other than to remark that we are unable to say that the chancellor erred in granting a new trial of the cause. The writ of error is dismissed.

Writ of error dismissed.

22 - 23505

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. WILLIAM O'DOWD, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

211 I.A. 402

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By an information filed in the Municipal Court it was charged that the defendant "did steal, take and carry away six cotton bed comforters of the value of nine dollars of the goods and chattels of," etc. Upon arraignment the defendant entered a plea of not guilty; trial by jury was waived and the cause was submitted for determination by the court. After the hearing of evidence defendant was found guilty "in manner and form as charged in the information herein." Later, on motion of the State's attorney for final judgment on the finding, it was adjudged by the court that the defendant "is guilty of the criminal offense of larceny"; he was sentenced to confinement at labor in the House of Correction for one year and fined five dollars. The cause is before us by writ of error for review.

The trial court made no finding as to the value of the property alleged to have been stolen, and, as held in People v. Ellison, 185 Ill. App. 287, whenever the measure or kind of punishment is dependent on the value of what has been taken, the court or jury, as the case may be, must find that value as part of the verdict or finding, otherwise the conviction cannot be sustained. A finding of guilty "in manner and form as charged in the information" is not sufficient to satisfy the requirements of the statute. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

22 - 23303

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

va.

WILLIAM O'DOWD,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

211 I.A. 402

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

By an information filed in the Municipal Court it was charged that the defendant "did steal, take and carry away six cotton bed comforters of the value of nine dollars of the goods and chattels of," etc. Upon arraignment the defendant entered a plea of not guilty; trial by jury was waived and the cause was submitted for determination by the court. After the hearing of evidence defendant was found guilty "in manner and form as charged in the information herein." Later, on motion of the State's attorney for final judgment on the finding, it was adjudged by the court that the defendant "is guilty of the criminal offense of larceny"; he was sentenced to confinement at labor in the House of Correction for one year and fined five dollars. The cause is before us by writ of error for review.

The trial court made no finding as to the value of the property alleged to have been stolen, and, as held in People v. Wilson, 185 Ill. App. 327, whenever the measure or kind of punishment is dependent on the value of what has been taken, the court or jury, in the case may be, must find that value as part of the verdict or finding, otherwise the conviction cannot be sustained. A finding of guilty "in manner and form as charged in the information" is not sufficient to satisfy the requirements of the statute. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

44- 23935

4226

HARRY S. MECARTNEY,
Defendant in Error,

vs.

CITY OF CHICAGO,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

211 I.A. 403

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is another stage in the history of a case which in some phase has been before the state and federal courts for many years past. The list of adjudications is long; the most recent are City v. Thomasson, 259 Ill. 322, and Mecartney v. City, 273 Ill. 276, in which are full statements of the facts and issues involved; a statement now would be merely repetition.

In the last mentioned case the Supreme Court held that the plaintiff, Mecartney, was "entitled to the awards, with interest, if they bear interest." (p. 285) Upon remandment the Circuit Court allowed plaintiff interest in the sum of $20,442.41, and defendant now asks us to reverse the judgment therefor.

Is plaintiff entitled to interest on the awards? Defendant says he is not, for the reason that the ordinance in this case provided "that said improvement shall be made and the cost thereof paid for by special assessment to be levied on the property benefited thereby to the amount that the same shall be benefited thereby"; that this is not an ordinary judgment against the city under the Eminent Domain act, but merely an order fixing the amount of the awards to be paid strictly in accordance with the terms of the condemnation ordinance. Defendant says it has been so adjudicated in City v. Thomasson, supra, where the court said: "While the property owners, on delivery of

HARRY G. MCCARTHY, Defendant in Error,	
vs.	
CITY OF CHICAGO, Plaintiff in Error.	

ERROR TO CIRCUIT COURT, COOK COUNTY.

SILLS, J.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

This is another step in the history of a case which in some phase has been before the state and federal courts for many years past. The list of adjudications is long; the most recent are City v. Thompson, 355 Ill. 324, and Weatherley v. City, 272 Ill. 272, in which are full statements of the facts and issues involved; a statement now would be merely repetitious.

In the last mentioned case the Supreme Court held that the plaintiff, Weatherley, was "entitled to the awards, with interest, if they bear interest." (p. 285) Upon remandment the circuit court allowed plaintiff interest in the sum of $23,842.41, and defendant now asks us to reverse the judgment therefor.

Is plaintiff entitled to interest on the awards? Defendant says he is not, for the reason that the ordinance in this case provided "that said assessment shall be made and the cost thereof paid for by special assessment to be levied on the property benefited thereby to the amount that the same will be benefited thereby"; that it is not an ordinary judgment against the city under the Damage Claim act, but merely an order "fixing the amount of the awards to be paid strictly in accordance with the terms of the condemnation ordinance." Defendant says it has been so adjudicated in City v. Thompson, supra, where the court said: "While the property owners, on delivery of

possession to the city, immediately acquired a vested right in their compensation, they did not acquire a right to have that compensation provided for and paid to them in any other manner than that specified in the ordinance. At the time possession was given the ordinance authorizing the improvement had been passed. * * * * They were bound by the provisions of the ordinance, and, although out of possession, must await payment according to its terms." Hence, defendant argues that plaintiff is restricted to the terms of the ordinance concerning payment, and as the ordinance makes no provision for the payment of interest plaintiff is not entitled to interest.

It also appears that in these proceedings the amount of the assessments for benefits was equal to the amount of the awards, that as a bookkeeping proposition one offset the other; and it is argued with force that the records show that the delay in collecting these awards has been caused in a large measure by the obstructive conduct of plaintiff himself, which has been adjudicated to have been unlawful, that is, without legal right, and it is persuasively urged that it would be a great injustice to allow him interest for the period he illegally prevented the collection of the awards.

Did we feel inclined to yield assent to these contentions we could not do so, for we are of the opinion that the Supreme Court, in Mecartney v. City, 273 Ill. 276, has adjudicated this question adversely to defendant, and that plaintiff's claim of res judicata must control.

Both reasoning and language in this last named opinion clearly indicate a conclusion that plaintiff is en-

possession to the city, immediately acquired a vested right in their compensation, they did not acquire a right to have that compensation provided for and paid to them in any other manner than that specified in the ordinance. As the right possession was given the ordinance authorizing the improvement had been passed, " " " were found by the violations of the ordinance, and, although out of possession, must await payment according to its terms." Hence, defendant argues that plaintiff is precluded by the terms of the ordinance concerning payment, for as the ordinance makes no provision for the payment of interest plaintiff is not entitled to interest.

It also appears that in cases ascertaining the amount of the assessments for benefits are equal to the amount of the awards, that as a bookkeeping proposition one offset the other; and it is argued also from the records show that the delay in collecting these awards has been caused in a large measure by the obstructive conduct of plaintiff himself, which has been adjudicated to have been unlawful, that is, without legal right, and it is persuasively urged that it would be a great injustice to allow him interest for the period of illegally prevented the collection of the awards.

We have lively inclines to view such a contention with conditions we could not do so, for we are of the opinion that the supreme court, in Westphalen v. City, 270 Ill. 372, has adjudicated this question adversely to defendant, and that plaintiff's claim of res judicata must control.

Our reasoning and knowledge in this last mentioned opinion clearly indicate a conclusion that plaintiff is en-

titled to interest. Defendant hangs its hope on the provisional words in the opinion referring to the awards, "if they bear interest," and contends that this leaves the entire question open. We do not think so. The many cases cited in the opinion and much that is said would be entirely superfluous had the court intended to leave the question open. These provisional words may refer to the possibility of the order of awards containing words negativing interest. No such words appear, and we must conclude that the Supreme Court holds that the general rule prevails and plaintiff is entitled to interest.

Upon remandment for a new trial the defendant asked leave to file an additional plea setting up the five-year statute of limitations. This was denied by the trial Judge, and it is argued that this was erroneous. The refusal of the trial court could be justified on the ground that the defendant did not file or ask leave upon the first trial to file the defense of the statute of limitations, but did so only after trial and review by the Supreme Court and remandment. We are of the opinion that it was no abuse of discretion on the part of the trial court to refuse to allow the plea to be filed on the ground that the motion was made too late in the history of the case. A further reason supporting the action of the trial court is in the fact that even if the plea of the statute of limitations had been filed and sustained it would not have ended the litigation, as plaintiff would still have a right of action in assumpsit or mandamus. City v. Thomasson, 259 Ill. 322; Mecartney v. City, 273 Ill. 276.

Defendant questions the application of the partial payments made on awards, urging that these payments should be applied first to the principal. Upon the first trial the court

titled to interest. Defendant hangs its hope on the provisional words in the opinion referring to the awards, "if they bear interest," and contends that this leaves the entire question open. We do not think so. The many cases cited in the opinion and much that is said would be entirely superfluous had the court intended to leave the question open. These provisional words may refer to the possibility of the order of awards containing words negativing interest. No such words appear, and we must conclude that the supreme Court holds that the general rule prevails and plaintiff is entitled to interest.

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Defendant questions the application of the partial payments made on awards, urging that these payments should be applied first to the principal. Upon the first trial the court

held that they should be applied first to pay interest accrued on the awards, any balance to be credited upon the principal. That method was before the Supreme Court upon review, and its propriety could properly have then been called in question. The rule is that not only those matters which are presented for determination, but also those which could have been presented, shall be deemed to have been adjudicated by the decision of the Supreme Court. We must therefore conclude that the method of application of the payments has been impliedly approved.

The record now before us is the same, or substantially the same, as it was upon the former trial and review by this court and the Supreme court. We are of the opinion that it clearly comes within the rule that the former decision of the Supreme Court is res judicata. See People v. Powers, 283 Ill. 438, and cases cited.

Holding as we do, that the questions now before us have either directly or constructively been adjudicated in Mecartney v. City, 273 Ill. 276, following that opinion the judgment of the Circuit Court is affirmed.

AFFIRMED.

held that they should be applied first to pay interest accrued on the awards, any balance to be credited upon the principal. That method was before the Supreme Court upon review, and its propriety could properly have then been called in question. The rule is that not only those matters which are presented for determination, but also those which could have been presented, shall be deemed to have been adjudicated by the decision of the Supreme Court. We must therefore conclude that the method of application of the payments has been impliedly approved.

The record now before us is the same, or substantially the same, as it was upon the former trial and review by this court and the Supreme Court. We are of the opinion that it clearly comes within the rule that the former decision of the Supreme Court is res judicata. See Leavitt v. Lowery, 288 Ill. 436, and cases cited.

Holding as we do, that the questions now before us have either directly or constructively been duly located in Macartney v. Hitt, 272 Ill. 476, following their opinion the judgment of the Circuit Court is affirmed.

AFFIRMED.

50 - 23941

BENJAMIN F. BIRCH,
Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

211 I.A. 404

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Petitioner, by mandamus, sought to compel respondents to restore his name to the payroll of patrolman in the Police Department of the City of Chicago. A general demurrer being overruled, defendants elected to stand thereby and judgment was rendered that the writ of mandamus issue.

This judgment must be reversed for the reasons stated in a number of decisions both in this court and in the Supreme Court, having to do with similar petitions. These cases hold substantially that the petitioner must show the legal existence of the office or position sought, and if it does not appear that there is an ordinance creating such office or position the writ of mandamus will not issue. No ordinance creating the position of patrolman is shown. Among such cases are Rudnick, Admr. Est. of Scannell v. City of Chicago et al., 198 Ill. App. 474; Vaughn v. City of Chicago, 198 Ill. App. 114; People ex rel. Hammerschleg v. City of Chicago, 198 Ill. App. 451; Preston v. City of Chicago, 246 Ill. 26; Stott v. City of Chicago, 205 Ill. 281; Moon v. The Mayor, 214 Ill. 40; Bullis v. City of Chicago, 235 Ill. 472; McNeill v. City of Chicago, 212 Ill. 481. It is unnecessary to repeat what is said in the opinions in these cases. Applying the rules there stated, the judgment of the Circuit Court is reversed.

REVERSED.

50 - 25941

BENJAMIN F. NIXON,
Defendant in Error,

vs.

CITY OF CHICAGO et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,

COOK COUNTY.

21 I.A. 404

MR. JUSTICE MOSURNIEY DELIVERED THE OPINION OF THE COURT.

Petitioner, by mandamus, sought to compel respondents to restore his name to the payroll of patrolman in the Police Department of the City of Chicago. A general demurrer being overruled, defendants elected to stand thereby and judgment was rendered that the writ of mandamus issue.

This judgment must be reversed for the reasons stated in a number of decisions both in this court and in the Supreme Court, having to do with similar petitions. These cases hold substantially that the petitioner must show the legal existence of the office or position sought, and if it does not appear that there is an ordinance creating such office or position the writ of mandamus will not issue. No ordinance creating the position of patrolman is shown. Among such cases are Rudolph, Adm. Est. of Scannell v. City of Chicago et al., 198 Ill. App. 474; Vaughn v. City of Chicago, 198 Ill. App. 114; People ex rel. Hawersbrick v. City of Chicago, 198 Ill. App. 451; Preston v. City of Chicago, 246 Ill. 26; Stout v. City of Chicago, 205 Ill. 291; Moon v. The Mayor, 214 Ill. 40; Smith v. City of Chicago, 235 Ill. 472; McNeill v. City of Chicago, 212 Ill. 481. It is unnecessary to repeat what is said in the opinions in these cases. Applying the rules there stated, the judgment of the circuit court is reversed.

REVERSED.

83 - 23995

ALBERT MACRAE,
Defendant in Error,

vs.

AMBROSE J. KRIER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

211 I.A. 405

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon a promissory note, had judgment against the defendant for $200 from which defendant appeals.

It is presented as ground for reversal that the evidence shows the legal owner of the note was the MacRae Blue Book Company, a corporation. The evidence does tend to show this, and whether or not this corporation assigned the note to the plaintiff, MacRae, is not made to appear, as the note itself is not in the record. The rule is that a suit on a promissory note must be brought in the name of the party holding the legal title. Clauser v. Stone, 29 Ill. 114; Newman v. Ravenscroft, 67 Ill. 496.

The defendant asserted fraud in the execution of the note. This made it necessary that the note itself should be introduced in evidence. Apparently this has not been done.

Upon the record before us this judgment cannot stand, and it is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

85 - 25295

ALFRET MACRAE, Defendant in Error,	ERROR TO MUNICIPAL COURT
vs.	OF CHICAGO.
AMBROSE J. KRIKE, Plaintiff in Error,	

21 I.A. 405

MR. JUSTICE MOURNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon a promissory note, had judgment against the defendant for $200 from which defendant appeals.

It is presented as ground for reversal that the evidence shows the legal owner of the note was the Macrae Blue Book Company, a corporation. The evidence does tend to show this, and whether or not this corporation assigned the note to the plaintiff, Krike, is not made to appear, as the note itself is not in the record. The rule is that a suit on a promissory note must be brought in the name of the party holding the legal title. Clausen v. Stone, 29 Ill. 116; Newman v. Bavenscroft, 67 Ill. 496.

The defendant asserted fraud in the execution of the note. This made it necessary that the note itself should be introduced in evidence. Apparently this has not been done.

Upon the record before us this judgment cannot stand, and it is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

106 - 24023

FRED SCHMIDT et al.,
Appellants,

vs.

EDWARD SCHMIDT, in his own right and as Executor, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

211 I.A. 409

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The facts in this case are stated in the opinion in Schmidt v. Schmidt, 277 Ill. 191, and also in an opinion of this court filed December 17, 1917, in case No. 23371. 209 Ill. App. 146 The question for our determination is whether the court erred in decreeing that a bequest of $6,000 to Edward Schmidt, appellee, was a charge upon the real estate by the provisions of the will.

Herman Schmidt, the deceased, left forty acres of land in Melrose Park and personal property of the value of $160. Debts against his estate were proved and allowed aggregating $1,243.03. By his will it was provided, first, that his just debts and funeral expenses should be paid out of the estate; second, "I give, devise and bequeath unto my son Edward Schmidt, the sum of six thousand dollars ($6,000) in consideration for his work on my farm and in caring for me during life." The third clause was: "All the rest and residue and remainder of my property whatsoever and wheresoever I give, devise and bequeath unto my children," etc.

As a general rule legacies are not charges upon realty unless expressly or impliedly made so by the terms of the will. Shuld v. Wilson, 225 Ill. 336; Haynes v. McDonald, 252 Ill. 236. But if the intention of the testator is that such legacy shall be a charge upon the real estate, this in-

FRED SCHMIDT et al.,
Appellants,

vs.

EDWARD SCHMIDT, in his own right and as Executor, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

211 I.A. 409

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The facts in this case are stated in the opinion in Schmidt v. Schmidt, 277 Ill. 191, and also in an opinion of this court filed December 17, 1917, in case No. 23371. The question for our determination is whether the court erred in decreeing that a bequest of $6,000 to Edward Schmidt, a - pellee, was a charge upon the real estate by the provisions of the will.

Herman Schmidt, the testator, left forty acres of land in Jefferson Park and personal property of the value of $180. Debts against his estate were proved and allowed aggregating $1,243.03. By his will it was provided, first, that his just debts and funeral expenses should be paid out of the estate; second, "I give, devise and bequeath unto my son Edward Schmidt, the sum of six thousand dollars ($6,000) in consideration for his work on my farm and in caring for me during life." The third clause was: "All the rest and residue and remainder of my property whatsoever and wheresoever I give, devise and bequeath unto my children," etc.

As a general rule legacies are not charges upon realty unless expressly or impliedly made so by the terms of the will. Bland v. Wilson, 225 Ill. 105; Lemmon v. Lockwood, 252 Ill. 436. Yet if the intention of the testator is that such legacy shall be a charge upon the real estate, this in-

tention will prevail although it should not be shown by express words, for it may be implied from the whole will taken together. Reid v. Corrigan, 143 Ill. 402. In 19 Am. & Eng. Ency. of Law, 2nd ed., p. 1354, the rule is stated as follows:

> "Where pecuniary legacies are given generally and there is a gift of the residue of real and personal estate, the whole residue being blended in one mass, it is now the settled rule in England and in most of the jurisidctions in the United States, that the legacies are charged upon the entire residue including the residuary realty."

This is supported by the citation of a very large number of cases, including a number in Illinois. We also find the following cases supporting this statement: Williams v. Williams, 189 Ill. 500; Simonsen v. Huthhinson, 231 Ill. 508; Haynes v. McDonald, 252 Ill. 336. Following these decisions we are of the opinion that the chancellor construed the will in accordance with the intention of the testator, and that the decree entered was proper in this respect, and it is affirmed.

AFFIRMED.

tention will prevail although it should not be shown by express words, for it may be implied from the whole will taken together. Reid v. Gorringe, 143 Ill. 402. In 19 Am. & Eng. Ency. of Law, 2nd ed., p. 1284, the rule is stated as follows:

> "Where remainder legacies are given generally and there is a gift of the residue of real and personal estate, the whole residue being blended in one mass, it is now the settled rule in England and in most of the jurisdictions in the United States, that the legacies are charged upon the entire residue including the realty realty."

This is supported by the citation of a very large number of cases, including a number in Illinois. We also find the following cases supporting this statement: Williams v. Williams, 158 Ill. 302; Dixon et v. Lundmann, 181 Ill. 508; Haynes v. Hounsle, 192 Ill. 355. Following these decisions we are of the opinion that the chancellor construed the will in accordance with the intention of the testator, and that the decree entered was proper in this respect, and it is affirmed.

AFFIRMED.

123 - 24042

MATTIE S. HUNT,
Defendant in Error,

vs.

THOMAS M. HUNT,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

211 I.A. 410

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in proceedings for divorce in which complainant was awarded a decree.

Complainant's original bill was for separate maintenance. Subsequently, after service of notice upon the defendant, complainant filed an amended bill asking for divorce. No rule was entered upon defendant to answer the amended bill, and without further notice his default was taken for failure to answer the amended bill, and the cause proceeded to a hearing as upon bill confessed. Proper practice would have required a rule upon defendant to plead to the amended bill before he could have been in default. Pratt v. Grimes, 35 Ill. 164; Moody v. Thomas, 79 Ill. 274.

Complainant sought divorce on the ground of extreme and repeated cruelty, and upon the hearing the only evidence adduced in support of this charge was the statement of complainant that ever since their marriage defendant had been guilty of excessive sexual intercourse. A doctor testified that he was unable to say this had any effect upon complainant's state of health. We are of the opinion that this evidence was not sufficient to support the charge made in the bill. Youngs v. Youngs, 130 Ill. 230.

A further consideration is that the parties lived together for sixteen years, so that if, as complainant says,

123 - 24042

MATTIE S. HUNT, Defendant in Error,	
vs.	ERROR TO CIRCUIT COURT,
THOMAS M. HUNT, Plaintiff in Error.	Jackson County.

2.1.1A.410

MR. JUSTICE MCCLURKY DELIVERED THE OPINION OF THE COURT.

By this writ of error is brought in review the record in proceedings for divorce in which complainant was awarded a decree.

Complainant's original bill was for separate maintenance. Subsequently, after service of notice upon the defendant, complainant filed an amended bill seeking for divorce. No rule was entered upon defendant to answer the amended bill, nor without further [illegible] was taken for failure to answer the amended bill, and the cause proceeded to a hearing on upon bill [illegible]. [illegible] pro-ceedings would have required a rule upon defendant to plead to the amended bill before he could have been [illegible]. Hyatt v. Grimes, 35 Ill. 104; Moody v. Thomas, 7 [illegible] 475.

Complainant sought divorce on the ground of ex-treme and repeated cruelty, and upon this [illegible] the only evi-dence adduced in support of this charge was the testimony of complainant that ever since their marriage defendant had been guilty of excessive sexual intercourse. [illegible] that he was unable to say this had any effect upon complainant's state of health. In one of the opinions [illegible] evi-dence was not sufficient to support the charge in the bill. Youngs v. Youngs, 152 Ill. [illegible].

A further consideration is that the parties lived together for sixteen years, so that if, as complainant says,

excessive sexual conduct began when they were first married, it would seem that the offense had been condoned. Abbott v. Abbott, 192 Ill. 439.

Complainant has not appeared in this court to defend her decree, and we are unable to see, in view of the lack of evidence, how it can be maintained. For the reasons above indicated the decree is reversed and the cause is remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

excessive sexual conduct began when they were first married. It would seem that the offense had been condoned. Abbott v. Abbott, 192 Ill. 439.

Complainant has not appeared in this court to defend her decree, and we are unable to see, in view of the lack of evidence, how it can be maintained. For the reasons above indicated the decree is reversed and the cause is remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED

WITH DIRECTIONS.

201 - 23544

211 I.A. 411

THE CITY OF WEATHERFORD,
a municipality of the
State of Oklahoma,
Appellant,

vs.

JOHN NUVEEN, doing business
as John Nuveen and Company,
Bankers,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The plaintiff appealed from a judgment in favor of defendant based on the court's finding that the cause of action had been previously adjudicated in the federal courts. The action is in assumpsit and predicated on the refusal of defendant to take and pay for certain of plaintiff's municipal bonds, according to defendant's alleged contract.

It would subserve no useful purpose and add nothing to the value of our conclusion to set forth the numerous and lengthy pleadings in this action and those of the action in the federal courts, to demonstrate that the two causes of action between the same parties rest on the same promises and contract, as was pleaded in the pleas of res judicata. This is so obvious from a comparison of the declarations in the two actions as to preclude discussion.

The principal contention is whether or not the final order of the federal trial court, affirmed by the United States Circuit Court of Appeals, disposed of the

201 - 23544

THE CITY OF WEATHERFORD,
a municipality of the
State of Oklahoma,
Appellant,

vs.

JOHN NUVEEN, doing business
as John Nuveen and Company,
Bankers,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE DAUPHIN
DELIVERED THE OPINION OF THE COURT.

The plaintiff appealed from a judgment in favor of defendant based on the court's finding that the cause of action had been previously adjudicated in the federal courts. The action is in assumpsit and predicated on the refusal of defendant to take and pay for certain of plaintiff's municipal bonds, according to defendant's alleged contract.

It would subserve no useful purpose and add nothing to the value of our conclusion to set forth the numerous and lengthy pleadings in this action and those of the action in the federal courts, to demonstrate that the two causes of action between the same parties rest on the same promises and contract, as was pleaded in the plea of res judicata. This is so obvious from a comparison of the declarations in the two actions as to preclude discussion.

The principal contention is whether or not the final order of the federal trial court, affirmed by the United States Circuit Court of Appeals, disposed of the

merits of the controversy or merely determined the sufficiency of the declaration as finally amended.

The issues herein were determined in the court below without a jury by proof of the record of the cause in the federal courts including the final order referred to, and the testimony of the federal trial judge. The record disclosed that a general demurrer and eleven special demurrers, previously filed, had been passed on, and were by said order allowed to stand to the declaration as finally amended.

The order in question reads:

> "Now come the parties hereto by their respective attorneys and now comes on to be heard the defendant's demurrer to the amended declaration. After hearing arguments * * * * it is ordered that said demurrer be and is hereby sustained. It is further ordered that the demurrers heretofore filed herein stand to the declaration as amended. Thereupon the plaintiff elects to stand by its declaration as amended. It is thereupon ordered and adjudged by the court that this case be and the same is hereby dismissed."

Over objection the trial judge testified that so far as he recalled there was no argument on the special demurrers, that he disposed of the case on the general demurrer, "on the broad ground that there was no cause of action stated in the declaration," that he did not consider any of the grounds raised by the special demurrers, and that he so indicated his views when he directed the clerk to enter the order. Neither the clerk's minutes nor the order itself is inconsistent with such statement.

In rebuttal plaintiff offered, and the court refused to receive, parts of defendant's printed brief filed in the United States Circuit Court of Appeals, indicating his reliance on defects in the declaration as finally amended and demurred to.

merits of the controversy or merely determined the sufficiency of the declaration as finally amended.

The issues herein were determined in the court below without a jury by proof of the record of the cause in the federal courts including the final order referred to, and the testimony of the federal trial judge. The record disclosed that a general demurrer and eleven special demurrers, previously filed, had been passed on, and were by said order allowed to stand to the declaration as finally amended.

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> "Now come the parties hereto by their respective attorneys and now comes on to be heard the defendant's demurrer to the amended declaration. After hearing arguments * * * it is ordered that said demurrer be and is hereby sustained. It is further ordered that the demurrers heretofore filed herein stand to the declaration as amended. Thereupon the plaintiff elects to stand by its declaration as amended. It is thereupon ordered and adjudged by the court that this case be and the same is hereby dismissed."

Over objection the trial judge testified that so far as he recalled there was no argument on the special demurrers, that he disposed of the case on the general demurrer, "on the broad ground that there was no cause of action stated in the declaration," that he did not consider any of the grounds raised by the special demurrers, and that he so indicated his views when he dictated the clerk to enter the order. Neither the clerk's minutes nor the order itself is inconsistent with such statement.

In substance plaintiff offered, and the court refused to receive, parts of defendant's printed brief filed in the United States Circuit Court of Appeals, indicating his reliance on defects in the declaration as finally amended and demurred to.

That a judgment on a general demurrer is a judgment on the merits and a bar to a subsequent suit on the same claim or demand will not be questioned (Vanlandingham v. Ryan, 17 Ill. 25, 30; Marie Church v. Trinity Church, 253 id. 21, 25); and it is equally conclusive by way of estoppel as a verdict finding the same facts followed by a judgment on such verdict. (Jackson v. Industrial Board, 280 id. 526).

But it is contended that the testimony of the trial judge as to what was passed on by him in entering said order was inadmissible. While it is unquestioned that parol evidence is inadmissible to contradict a record it is also well settled law that when a former recovery is relied on as a bar parol evidence not contradictory of the record may, in case of doubt, be introduced to show what was included within and investigated on the trial of the issue. (C. B. & Q. R. R. Co. v. Schaffer, 124 id. 112; People v. Burt, 267 id. 640, 642; People v. Becker, 253 id. 131, 136, and Vanlandingham v. Ryan, 17 id. 25, 28.)

That the order of the federal court relied on as a bar to the cause of action is indefinite and uncertain is manifest in view of the state of the record of that court showing the pendency of both a general demurrer and special demurrers at the time of its entry. In such a state the reference in the order to allowing "demurrers heretofore filed" to stand (which included the general demurrer and eleven special demurrers) and to sustaining "defendant's demurrer" is so uncertain and indefinite as to present a doubt whether the court passed on a single demurrer or all of them. The language does not justify the conclusion that the court passed on the special demurrers only. Whether it passed on them or not, if it passed on the general

That a judgment on a general demurrer is a judgment on the merits and a bar to a subsequent suit on the same claim or demand will not be questioned (Vanlandingham v. Ryan, 17 id. 25, 30; Marie Clayton v. Trinity Church, 245 id. 21, 28); and it is equally conclusive by way of estoppel as a verdict finding the same facts followed by a judgment on such verdict. (Jackson v. Industrial Board, 280 id. 326).

But it is contended that the testimony of the trial judge as to what was passed on by him in entering said order was inadmissible. While it is unquestioned that parol evidence is inadmissible to contradict a record it is also well settled law that when a former recovery is relied on as a bar parol evidence not contradictory of the record may, in case of doubt, be introduced to show what was included within and investigated on the trial of the issue. (C. & A. R. R. Co. v. Schaffer, 124 id. 112; People v. Burt, 287 id. 640, 642; People v. Becker, 255 id. 131, 136, and Vanlandingham v. Ryan, 17 id. 25, 28.)

That the order of the federal court relied on as a bar to the cause of action is indefinite and uncertain is manifest in view of the state of the record of that court showing the pendency of both a general demurrer and special demurrers at the time of its entry. In such a state the reference in the order to allowing "demurrers heretofore filed" to stand (which included the general demurrer and eleven special demurrers) and to sustaining "defendant's demurrer" is so uncertain and indefinite as to present a doubt whether the court passed on a single demurrer or all of them. The language does not justify the conclusion that the court passed on the special demurrers only. Whether it passed on them or not, if it passed on the general

demurrer then it disposed of the merits of the controversy. In view of such indefiniteness and uncertainty we think the admission of the testimony of the trial judge as to what was actually argued, considered and decided in sustaining "said demurrer", comes clearly within the rule above stated, it being consistent with, and not contradictory of, the record.

It was said in Jackson v. Industrial Board, supra, that "public announcement or reason of the court or judge may be proven by parol evidence in order to determine what issues were definitely passed upon and decided." In that case parol testimony was introduced at a hearing before the Industrial Board to show that the circuit court in sustaining a demurrer to a declaration announced the particular ground of its decision. But we deem it unnecessary to distinguish the cases in which the doctrine has been discussed, or to elaborate upon a doctrine so well established.

This being the case and the evidence being heard without a jury, the alleged errors in receiving the proceedings and pleadings in the federal court that preceded the last amended declaration to which the demurrer was sustained, and its refusal to receive in evidence portions of defendant's briefs used on appeal from said order, need not be considered, for with or without such evidence or any part thereof the court's finding might well rest on the testimony of the trial judge alone, it being conclusive of the question whether the case was disposed of on its merits.

AFFIRMED.

demurrer then it disposed of the merits of the controversy. In view of such indefiniteness and uncertainty we think the admission of the testimony of the trial judge as to what was actually argued, considered and decided in sustaining "said demurrer", comes clearly within the rule above stated, it being consistent with, and not contradictory of, the record.

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AFFIRMED.

223 - 23568

JOHN CONNERS,
Appellee,

vs.

GERTRUDE WAGNER et al.,

ON APPEAL OF MAUD GUETTRICH, WILLIAM GUETTRICH and L. HISGEN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case contains three counts, none of which states a cause of action. It alleges that the relationship of tenant and landlord existed between the plaintiff (appellee) and the defendants (appellants), that plaintiff was in possession of the rented premises, that it was the duty of defendants to keep them in tenantable repair, that they failed to do so, and that injury resulted to the plaintiff by his slipping and falling down a stairway on the premises that was without a railing. No one of the counts states the agreement between the parties nor any facts from which a duty to repair arises, hence states no cause of action.

It is elementary law that the landlord is not bound to make repairs unless he has assumed such duty by agreement with the tenant. (Sunasack v. Morey, 196 Ill. 569.) The terms of the letting not being stated, the averment that it was the landlord's duty to repair is a mere conclusion. Without a statement of facts from which such duty arises, no cause of action was stated. (Sargent Co. v. Baublis, 215 id. 428-431.)

223 - 23565

JOHN CONNERS,
Appellee,

vs.

GERTRUDE WAGNER et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

ON APPEAL OF MAUD GUETTICH,
WILLIAM GUETTICH and L.
HIGGINS,

MR. PRESIDING JUSTICE HARKER
DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case contains three counts, none of which states a cause of action. It alleges that the relationship of tenant and landlord existed between the plaintiff (appellee) and the defendants (appellants), that plaintiff was in possession of the rented premises, that it was the duty of defendants to keep them in tenantable repair, that they failed to do so, and that injury resulted to the plaintiff by his slipping and falling down a stairway on the premises that was without a railing. No one of the counts states the agreement between the parties nor any facts from which a duty to repair arises, hence states no cause of action.

It is elementary law that the landlord is not bound to make repairs unless he has assumed such duty by agreement with the tenant. (Hunnacek v. Morey, 198 Ill. 589.) The terms of the letting not being stated, the averment that it was the landlord's duty to repair is a mere conclusion. Without a statement of facts from which such duty arises, no cause of action was stated. (Garrent Co. v. Bauhle, 215 id. 428-431.)

Each of the defendants (except Gertrude Wagner, who was not served with summons) filed an affidavit of merits, however, traversing the allegations of duty, etc., and asserting that plaintiff was injured by reason of his own negligence. On February 14th, 1917, none of the defendants being present at the trial, a finding and judgment were entered for plaintiff for $450. Two days later defendants filed a motion, supported by affidavit, to vacate the finding and judgment. On March 17th, 1917, after several continuances, the motion was overruled. The court's jurisdiction over the case then ceased. (People v. Wells, 255 id. 450.) But thereafter, on the same day, leave was given to plaintiff to file amendments to his statement of claim, and to defendants to file an affidavit of merits, and on March 31st, the affidavit of merits filed by defendants was stricken on plaintiff's motion, though it stated a legal defense to plaintiff's assumed ground of action.

It is unnecessary to consider intervening errors or refer to the irregular and unauthorized procedure after March 17th, for the original statement of claim not stating a cause of action is so defective as not to sustain a judgment, (Gillman v. Chicago Railways Co., 268 id. 305) and the amendments gave it no vitality.

Even if the statement of claim as amended stated a cause of action it was equivalent to setting up a new cause of action, which in the absence of statutory authority is not allowable after judgment. (31 Cyc. 405.) Our statute permits amendment after judgment for defects or imperfections in matters of form, but not as to substance. (C. & A. R. R. Co. v. Clausen, 173 id. 100-103.) An unauthorized amendment

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It is unnecessary to consider intervening errors or refer to the irregular and unauthorized procedure after March 17th, for the original statement of claim not stating a cause of action is no defective as not to sustain a judgment, (Gillman v. Chicago Railway Co., 255 id. 409) and the amendments gave it no vitality.

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to a defective statement of claim did not, therefore, better the situation. The judgment still rested on the original statement of claim which was insufficient to sustain it. Having no legal basis it must be reversed.

REVERSED.

to a defective statement of claim did not, therefore, better the situation. The judgment still rested on the original statement of claim which was insufficient to sustain it. Having no legal basis it must be reversed.

REVERSED.

230 - 23575

ENRICO FORMELLA, doing business as E. Formella & Company, a corporation,
Appellee,

vs.

DURAND and KASPER COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 414

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On March 10th, 1917, plaintiff (appellee) made an offer to the salesman for defendant company (appellant) to buy 250 barrels of flour at $8.80 per barrel to be taken in sixty days. After it was submitted to defendant's manager, the salesman at his request procured plaintiff's signature to a written order for the same on those terms, dated March 15th, and brought it to him, leaving a duplicate copy thereof with plaintiff. Five barrels as a sample, though subsequently treated as part of the order, were delivered before the signing of said order, and twenty-five barrels on April 25th. Payment for these deliveries was made April 16th and May 10th, respectively, at the price so agreed upon.

The flour was ordered for the purpose of manufacturing macaroni for one of plaintiff's customers, and it was recognized that deliveries would be called for as needed. Requests for more deliveries were made in the meantime, but not honored, defendant requiring payment for deliveries already made before making another, which was made. On May 10th, after payment for the last delivery, plaintiff ordered twenty-five barrels more. He claimed that defendant's

MARIOS FORNELLA, doing business as R. Fornella & Company, a corporation, Appellee, vs. DURAND and KAUFER COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE HAMMER DELIVERED THE OPINION OF THE COURT.

On March 10th, 1921, plaintiff (appellee) made an offer to the salesman for defendant company (appellant) to buy 250 barrels of flour at $8.60 per barrel to be taken in sixty days. After it was submitted to defendant's manager, the salesman at his request procured plaintiff's signature to a written order for the same on these terms, dated March 15th, and brought it to him, leaving a duplicate copy thereof with plaintiff. Five barrels as a sample, though subsequently treated as part of the order, were delivered before the signing of said order, and twenty-five barrels on April 25th. Payment for these deliveries was made April 10th and May 10th, respectively, at the price so agreed upon.

The flour was ordered for the purpose of manufacturing macaroni for one of plaintiff's customers, and it was recognized that deliveries would be called for as needed. Requests for more deliveries were made in the meantime, but not honored, defendant requiring payment for deliveries already made before making another, which was made. On May 10th, after payment for the last delivery, plaintiff ordered twenty-five barrels more. He claimed that defendant's

manager then said it had not the flour on hand but would get it. Getting no satisfaction from further requests made in the meantime, as he testified, he asked for the rest of the flour on May 12th and offered to pay for the same at the contract price through his bank, presenting from it a letter of credit and assurances of payment. No action seems to have been taken on this request and offer, though Formella testified that defendant refused to make any further delivery. While defendant's manager denied making any refusal and admits receiving such requests and such letter of credit and that he did not require cash payment, there was no further delivery under the contract and no evidence in the record indicating an intention or offer on the part of defendant to make further delivery except that in a conference some days later with reference to a settlement it claimed a willingness to do so provided arrangements for credit were then made.

Eliminating argument, conclusions, assumptions and recitations of evidentiary facts from defendant's affidavit of defense to ascertain what defense was really stated, and referring only to what was relied on at the trial and argued here, we find the defense to be (1) that if the proper date of the contract was March 10th, the request for final deliveries was not made within sixty days therefrom, and if March 15th, then it was not timely, being made, as claimed, on May 14th, the sixtieth day therefrom, and (2) that plaintiff tendered no money to defendant when he made such demand.

manager then said it had not the flour on hand but would get it. Getting no satisfaction from further requests made in the meantime, as he testified, he asked for the rest of the flour on May 12th and offered to pay for the same at the contract price through his bank, presenting from it a letter of credit and assurances of payment. No action seems to have been taken on this request and offer, though Formella testified that defendant refused to make any further delivery. When a defendant's manager denied making any refusal and admits receiving such requests and such letter of credit and that he did not require cash payment, there was no further delivery under the contract and no evidence in the record indicating an intention or offer on the part of defendant to make further delivery except that in a conference some days later with reference to a settlement it claimed a willingness to do so provided arrangements for credit were then made.

Eliminating argument, conclusions, assumptions and recitations of evidentiary facts from defendant's affidavit of defense to ascertain what defense is really stated, and referring only to what was relied on at the trial and argued here, we find the defense to be (1) that if the proper date of the contract was May 1st, the request for final deliveries was not made within sixty days therefrom, and if March 12th, then it was not timely being made, as claimed, on May 14th, the sixtieth day therefrom, and (2) that Leinhill's contract no money to defendant when he made such demand.

As to the first ground, the contract was drawn by defendant and bore date MARCH 15th, and was treated in force as from that date, the thirty barrels delivered being considered by defendant as delivered under said contract.

As to tender, if required, we think there was adequate proof of a sufficient offer to meet the requirements of the contract, there being evidence of a readiness, willingness and ability on the part of plaintiff to take the goods. (Sec. 42, Uniform Sales Act.)

The case was tried without a jury. The court held all of defendant's propositions of law except one, which was to the effect that the law implies under such a contract that the flour should be ordered within a reasonable time, within sixty days, holding however in another that under such a contract a demand for delivery on the sixtieth day is not timely and that to put the seller in default the buyer must have made a timely demand for delivery and a legal tender, and the seller must have refused to deliver.

While it is urged that the court's finding and judgment were contrary to the law and the evidence, we think the court's holdings as to the law were applicable to the evidence and consistent with the finding.

While there was some conflict of evidence as to a demand prior to May 12th there was evidence from which the court could have found that there was a request for twenty-five barrels on May 10th, and that defendant disregarded the same and also the request made May 12th for the rest of the flour. Under the circumstances we think this was timely. Defendant did not in fact refuse or fail to deliver on the ground that it was not. The

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evidence discloses no offer or intention of defendant to deliver the same, or legal excuse for its failure to fill said order. It did not require cash as a condition of delivery and paid no attention to plaintiff's offer to pay for the rest of the flour at once. It might be inferred that it wished to be relieved from carrying out the contract as the price of flour had risen several dollars a barrel.

It can be said, we think, that defendant gave a practical construction to the contract as not requiring cash on delivery by extending a limited credit on the deliveries it made, as it had done in previous dealings with plaintiff. (Whalen v, Stephens, 193 Ill. 121, 134.) But disregarding evidence bearing upon a practical construction so given, and viewing the contract as a cash sale, delivery and payment were concurrent conditions, (Anglo American Provision Co. v. Prentiss, 157 id. 506, 515) that is to say, as defined by section 42 of the Uniform Sales Act, "the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." We think the evidence shows readiness and willingness on the part of plaintiff but not on the part of defendant. And it is immaterial if, as claimed by defendant, it offered some days after the time for performance expired to deliver the goods provided an arrangement was then made for credit.

After what was tantamount to defendant's refusal to perform, plaintiff bought of another party sufficient

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After what was tantamount to defendant's refusal to perform, plaintiff bought of another party sufficient

flour to meet the purposes of his contract. The damages assessed were the difference between what he had to pay therefor and the price agreed on with defendant. We think there was sufficient evidence that plaintiff could not then obtain flour of the grade he had contracted for at a less price than what he paid. There was no such thing as a market price, manufacturer's brands and grades being different, for which each had his own price.

While defendant did not sign the contract it held and acted upon it as a valid instrument which was equivalent to a formal execution. (Vogel v. Pekoc, 157 id. 339, 341; Fortham v. Peters, 206 id. 159, 166.)

We think, therefore, there was no reversible error, that the evidence and law support the court's implied finding that the contract was valid, that it was breached by defendant, that defendant was not ready and willing to perform its part of the contract, that plaintiff was, and also able to, and that he suffered the damages assessed.

It is further urged as error that defendant's manager was required when called to testify under section 33 of the Municipal Court Act to produce papers in response to a subpoena duces tecum and to testify as to market prices of flour. Bearing in mind that the case was tried without a jury and that the evidence was relevant to the issues, and hence admissible at some stage of the proceeding, we find nothing in the manner of the examination or the procedure that we deem prejudicial error.

AFFIRMED.

flour to meet the purposes of his contract. The damages assessed were the difference between what he had to pay therefor and the price agreed on with defendant. We think there was sufficient evidence that plaintiff could not then obtain flour of the grade he had contracted for at a less price than what he paid. There was no such thing as a market price, manufacturer's brands and grades being different, for which each had its own price.

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AFFIRMED.

304 - 23649

LUIGI RUSSO FU AGATINO,
Appellee,

vs.

LOUIS GINOCCHIO et al.,
Appellants.

Appeal from
Municipal Court
of Chicago.

211 I.A. 416

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

By this action plaintiff Russo, a dealer in almonds located in Sicily, seeks recovery of damages for alleged breach of three different contracts for sale to defendants, trading as partners in Chicago.

The main question is whether there was a meeting of minds in one of the contracts declared on. The original statement of claim alleged a sale to defendants February 3, 1914, for account of plaintiff of a certain quantity and brand of shelled almonds at 120 shillings per hundred weight, designating "shipment September". The statement of claim as amended during the trial alleged that the contract was modified about March 30, 1914, so as to provide "shipment by September 16, 1914", thus counting on a different contract.

The negotiations were had in Chicago with defendant Costa through one Pinder, a local broker, and began about January 30, 1914, by Costa's inquiry of the latter for the price of such almonds for "first half September". Pinder then cabled for price to plaintiff in Sicily as follows: "Lowest 150 bales Palma new crop first half September direct steamer", to which Russo cabled reply "126 September". Costa saying he had price from other

LUIGI BUSSO DU ADATINO, Appellee,		Appeal from Municipal Court of Chicago.
vs.		
LOUIS SINCOCHIO et al., Appellants.		

MR. PRESIDING JUSTICE SCHREE DELIVERED THE OPINION OF THE COURT.

By this action plaintiff Busso, a dealer in almonds located in Italy, seeks recovery of damages for alleged breach of three different contracts for sale to defendants, trading as partners in Chicago.

The main question in whether there was a meeting of minds in one of the contracts declared on. The original statement of claim alleged a sale to defendants "January 2, 1914, for account of plaintiff of a certain quantity and brand of shelled almonds at 120 shillings per hundred weight, designating "shipment September". The statement of claim as amended during the trial alleged that the contract was modified about March 30, 1914, so as to provide "shipment by September 16, 1914", thus counting on a different contract.

The negotiations were had in Chicago with defendant Costa through one Kinder, a local broker, and began about January 30, 1914, by Costa's inquiry of the latter for the price of such almonds for "first half September". Kinder then called for price to plaintiff in Sicily as follows: "Lowest 180 Union Palma new crop first half September direct steamer", to which Busso cabled reply "120 September". Costa replied he had sales from other

shippers at 120 "first half September", Pinder cabled back that the Hamburg market was lower and received cable reply from Russo "I accept 120 September". This reply was verbally communicated to Costa whereupon he, contracting for his firm and understanding that it was a direct response to his inquiry, said he would take 150 bales, and Pinder then, Feb. 3, 1914, cabled Russo "Sold Costa 150 Palma new crop September 120" (meaning 150 bales at 120 shillings per cwt.) and made out a contract in triplicate form for "September shipment", mailing one copy to Russo and another to Costa, which did not, however, come to Costa's personal attention.

In a verbal allusion to the order by Pinder on March 25th, Costa learned that it was sent forward for "September shipment", (which gave the seller the option to ship any time during September) and insisted that it was wrong. Thereupon on the same date Pinder cabled Russo:

> "Costa will stipulate * * * latest September 16th * * having understood middle September shipment. Kindly confirm offer Palma boxes September."

To this Russo replied by letter, March 30th, saying:

> "I do not understand how you can wire me all of a sudden to change the contract. It was in your very letter of Feby. 3rd. that the deal was confirmed according to my telegrams for shipment in September. You have asked me to confirm and I have done so, but the price for the first half of September is higher than for September, and I must charge you with the difference."

The letter also stated that he had already bought the almonds "for September delivery" and asked for an exhaustive explanation, which Pinder gave in a letter dated April 11th, clearly showing that Costa understood the offer and order to be "shipment for first half September," and that the misunderstanding grewout of his failure definitely to make known to Costa that Russo's price was for "September" instead of "First half

shippers at 120 "first half September". Finder cabled back that the Hamburg market was lower and received cable reply from Russo "I accept 120 September". This reply was verbally communicated to Costa whereupon he, contracting for his firm and understanding that it was a direct response to his inquiry, said he would take 150 bales, and Finder then, Feb. 3, 1914, cabled Russo "Sold Costa 150 Palma new crop September 120" (meaning 150 bales at 120 shillings per cwt.) and made out a contract in triplicate form for "September shipment", mailing one copy to Russo and another to Costa, which did not, however, come to Costa's personal attention.

In a verbal allusion to the error by Finder on March 25th, Costa learned that it was sent forward for "September shipment", (which gave the seller the option to ship any time during September) and insisted that it was wrong. Thereupon on the same date Finder cabled Russo:

> "Costa will stipulate * * * latest September 15th * * having misinterpreted middle September shipment. Kindly confirm offer Palma boxes September."

To this Russo replied by letter, March 27th, saying:

> "I do not understand how you can wire me all of a sudden to change the contract. It was in your very letter of Feb. 3rd. that the deal was confirmed according to my telegrams for shipment in September. You have asked me to confirm and I have done so, but the price for the first half of September is higher than for September, and I must charge you with the difference."

The letter also stated that he had already bought the almonds "for September delivery" and asked for an exhaustive explanation, which Finder gave in a letter dated April 11th, clearly showing that Costa misunderstood the offer and order to be "shipment for first half September," and that the misunderstanding grew out of his failure definitely to make known to Costa that Russo's price was for "September" instead of "First half

of September" and that his cablegram of March 25th called for the confirmation of Costa's understanding of the contract.

While Russo's letter of March 30th is somewhat ambiguous, and was construed by the trial court as a consent to a modification of the contract, - which would be warranted if we look alone to the proposition therein to hold the broker liable for the difference - yet as a whole the letter indicates Russo's adherence to the terms cabled February 3rd, and such intention was made clear in his letter of May 23rd replying to Pinder's of April 11th and saying:

> "I can only confirm what I have said in mine of March 30th. The buyer's reasons do not concern me. For me the deal was closed for September and I beg you to have the letter of credit made out accordingly in due course."

Costa was never informed of this reply and unquestionably supposed the contract had been changed accordingly, whereas there is nothing in the record to indicate that prior to the trial Russo ever changed from the position that the deal was "closed for September".

No further communications respecting this matter were had until in August after the European war broke out, when plaintiff wrote defendants asking them to open credit in order that he might arrange financial affairs before shipment. The banks being unwilling to issue letters of credit at that time, defendants cabled and wrote to that effect on September 2nd, and later, on September 10th, wrote they were obliged "for causes majeure to cancel the entire business". No question is raised but that this constituted a breach of whatever contracts existed between them.

of September" and that his cablegram of March 28th called for the confirmation of Costa's understanding of the contract.

While Russo's letter of March 28th is somewhat ambiguous, and was interpreted by the trial court as a consent to a modification of the contract, - which would be warranted if we look alone to the proposition therein to hold the broker liable for the difference - yet as a whole the letter indicates Russo's adherence to the terms called February 3rd, and such intention was made clear in his letter of May 22nd replying to Kidder's of April 11 and saying:

> "I can only confirm what I have said in mine of March 28th. The buyer's reasons do not concern me. For me the deal was closed for September and I beg you to have the letter of credit made out accordingly in due course."

Costa was never informed of this reply and unquestionably supposed the contract had been changed accordingly, whereas there is nothing in the record to indicate that prior to the trial Russo ever changed from the position that the deal was "closed for September".

No further communications respecting this matter were had until in August after the European war broke out, when plaintiff wrote defendants inquiring as to open credit in order that he might arrange financial affairs before shipment. The banks being unwilling to issue letters of credit at that time, defendants replied and wrote to that effect on September 3rd, and later, on September 16th, wrote they were obliged "for causes independent to cancel the entire business". No question is raised but that this constituted a breach of whatever contract is existed between them.

But from the foregoing we are clearly of the opinion that the minds of the parties never met in a contract for the 150 bales which they undertook to negotiate for. It is clear from Russo's subsequent correspondence that he did not consent to a "shipment for first half September," but on the contrary continued to adhere to the cablegram of February 3rd for "September shipment", and this was his attitude until he amended his statement of claim during the trial and thus changed the theory of his action. But the change was not by reason of any mistake of fact made in his original statement, and his change of attitude did not change the fact disclosed by the evidence that the minds of the parties never met in a mutual understanding as to the terms of sale for the 150 bales of almonds. From February 3rd, 1914, until the trial March,1917, plaintiff stood on the terms of the original purchase order and at no time before the trial contended or assumed that they had been modified. All this time Costa, acting for defendants, stood by his original proposition to which the purchase order did not conform, and never assented to the terms of the latter. How, then, can it be said that their minds ever met when during all this time, from the very beginning of the negotiations, one party insisted and relied on one understanding of the terms made and the other on a different understanding, each having reason for his particular understanding. We think it clear that the evidence does not support the court's finding that Russo accepted Costa's terms on March 30. His subsequent letter clearly indicates the contrary, and as the purchase order of February 3rd never expressed Costa's understanding the minds of the parties never met at any stage of the proceedings with

But from the foregoing we are clearly of the opinion that the minds of the parties never met in a contract for the 180 bales which they undertook to negotiate for. It is plain from Russo's subsequent correspondence that he did not consent to a "shipment for first half September," but on the contrary continued to adhere to the cablegram of February 3rd for "September shipment", and this was his attitude until he amended his statement of claim during the trial and then changed the theory of his action. But the change was not by reason of any mistake of fact made in his original statement, and his change of attitude did not change the fact disclosed by the evidence that the minds of the parties never met in a mutual understanding as to the terms of sale for the 180 bales of grounds. From February 3rd, 1919, until the trial March,1919, plaintiff stood on the terms of the original purchase order and at no time before the trial contended or assumed that they had been modified. All this time Costa, acting for defendants, stood by his original proposition to which the purchase order did not conform, and never as agreed to the terms of the latter. Now, then, can it be said that their minds ever met when during all this time, from the very beginning of the negotiations, one party insisted and relied on one understanding of the terms made and the other on a different understanding, each having reason for his particular understanding. We think it clear that the evidence does not support the court's finding that Russo accepted Costa's terms on March 3d. His subsequent letter clearly indicates the contrary, and as the purchase order of February 3rd never expressed Costa's understanding the minds of the parties never met at any stage of the proceedings with

respect to the 150 bales.

The only point made as to the other two contracts is not as to liability but as to the competency of the evidence of damages. We think it clear that the contract called for delivery at the foreign port where the market price during the period for delivery - allowing defendants the highest price during that period - showed a decline of 22 shillings per cwt. making a loss of $803.55 on the two contracts. The evidence showed that there was no market price at the port of delivery other than or different from that of the foreign port after deducting freight and commissions. In other words, there was no real difference of price at the two ports. Hence there will be a reversal and judgment here against appellant for the amount of the loss on the two contracts aforesaid as thus established.

REVERSED WITH FINDING OF FACT AND
JUDGMENT HERE FOR $803.55.

respect to the 150 bales.

The only point made as to the other two contracts is not as to liability but as to the competency of the evidence of damages. We think it clear that the contract called for delivery at the foreign port where the market price during the period for delivery - allowing defendants the highest price during that period - showed a decline of 22 shillings per cwt. making a loss of $808.55 on the two contracts. The evidence showed that there was no market price at the port of delivery other than or different from that of the foreign port after deducting freight and commissions. In other words, there was no real difference of price at the two ports. Hence there will be a correct and judgment here against appellant for the amount of the loss on the two contracts aforesaid as thus established.

REV AFFIRMED WITH FINDING OF FACT AND
JUDGMENT HERE FOR $804.55.

FINDING OF FACT.

We find that there was no contract entered into between the parties hereto for the sale of 150 bales of almonds as claimed and described in the statement of claim, either as originally filed or as amended.

FINDING OF FACT.

We find that there was no contract entered into between the parties hereto for the sale of 150 bales of almonds as claimed and described in the statement of claim, either as originally filed or as amended.

55 - 23957

211 I.A. 420

JAKUB ZAMULEWICZ,
Defendant in Error,

vs.

BOLESLAW JASUDES,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was an action in tort wherein Zamulewicz (plaintiff below) obtained a verdict and judgment against Jasudes (the defendant) on the ground that the latter procured his signature to a contract for the purchase of two lots through false and fraudulent translation and interpretation of the written contract. It is argued that the evidence does not sustain the charge of fraud, and that evidence was improperly admitted. There is no question about the law, and no complaint is made of the instructions given.

On a careful examination of the evidence we find no occasion for disturbing the judgment. The parties hereto and their witnesses were Lithuanians. Plaintiff could neither read nor write English. On the day of his arrival in Chicago defendant undertook to negotiate with him for the purchase of said lots and the evidence tends to show that he agreed to give a clear title to the lots on the payment of $700 to be paid in installments, plaintiff to pay no interest, taxes or special assessments. Preliminary negotiations to that effect were made in the presence of witnesses, who testified thereto, some of whom

58 - 23957

JAKUB ZAMBLEWICZ,
Defendant in Error,

vs.

ROMUALD JASUDES,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was an action in tort wherein Zamblewicz (plaintiff below) obtained a verdict and judgment against Jasudes (the defendant) on the ground that the latter procured his signature to a contract for the purchase of two lots through false and fraudulent translation and interpretation of the written contract. It is argued that the evidence does not sustain the charge of fraud, and that evidence was improperly admitted. There is no question about the law, and no complaint is made of the instructions given.

On a careful examination of the evidence we find no occasion for disturbing the judgment. The parties hereto and their witnesses were Lithuanians. Plaintiff could neither read nor write English. On the day of his arrival in Chicago defendant undertook to negotiate with him for the purchase of vacant lots and the evidence tends to show that he agreed to give a clear title to the lots on the payment of $710 to be paid in installments, plaintiff to pay no interest, taxes or special assessments. Preliminary negotiations to that effect were made in the presence of witnesses, who testified thereto, some of whom

were also present when the contract was brought by defendant and read to plaintiff for signature. None of the parties so present except defendant could read or write English; whereupon defendant purported to read the contract to plaintiff in their presence before it was signed. Plaintiff and these witnesses testified in effect that the contract as so read expressly provided that plaintiff was to pay no interest, taxes or special assessments but was to obtain a clear title for the sum of $700. Plaintiff was about twenty-one years old, and there was evidence tending to show that Jasudes persuaded him that it was unnecessary to have a lawyer or to show the contract, but that he could rely upon his representation of its contents, and got others in whom he might, in his position as a comparative stranger, expect to have a reasonable degree of confidence, and who had also purchased lots similarly situated, to "coax" him into the purchase. While the contract itself contained no such provisions, and defendant denied mistranslating it, we think there was sufficient evidence to justify the jury's finding of fact that defendant falsely and fraudulently translated the contract to plaintiff under circumstances warranting plaintiff's reliance thereon and his exercise of reasonable prudence, and read into it provisions which it did not contain, and that plaintiff relying upon such translation as correct was induced to sign the contract. He paid $675 thereon and offered to pay the other $25, the balance as he understood the contract, but the land had been sold in the meantime for taxes and special assessments, for which he refused to pay, and without the payment of which defendant refused to give a deed to the property. The verdict of the jury was for the sum of money he thus paid on the contract.

were also present when the contra t was brought by defendant and read to plaintiff for signature. None of the parties so present except defendant could read or write English; whereupon defendant purported to read the contract to plaintiff in their presence before it was signed. Plaintiff and these witnesses testified in effect that the contract as so read expressly provided that plaintiff was to pay no interest, taxes or special assessments but was to obtain a clear title for the sum of $700. Plaintiff was about twenty-one years old, and there was evidence tending to show that Jacobs persuaded him that it was unnecessary to have a lawyer or to show the contract, but that he could rely upon his representation of its contents, and get others in whom he might, in his position as a comparative stranger, expect to have a reasonable degree of confidence, and who had also purchased lots similarly situated, to "come" him into the purchase. While the contract itself contained no such provisions, and defendant denied misrepresenting it, we think there was sufficient evidence to justify the jury's finding of fact that defendant falsely and fraudulently translated the contract to plaintiff under circumstances warranting plaintiff's reliance thereon and his exercise of reasonable prudence, and read into it provisions which it did not contain, and that plaintiff relying upon such translation as correct was induced to sign the contract. He paid $675 thereon and offered to pay the other $25, the balance as he understood the contract, but the land had been sold in the meantime for taxes and special assessments, for which he refused to pay, and without the payment of which defendant refused to give a deed to the property. The verdict of the jury was for the sum of money he thus paid

The testimony complained of was to the effect that Jasudes subsequently told others that he had agreed to return plaintiff his money with interest at 10 per cent in two years if he was dissatisfied with his bargain. There was evidence, which this had some tendency to corroborate, that the contract as translated by Jasudes contained such a provision. But if not admissible, the judgment should not be reversed on that account in view of the fact that there was sufficient evidence of fraudulent representations as to other matters to justify the recovery. The judgment will be affirmed.

AFFIRMED.

The testimony complained of was to the effect that Jaudes subsequently told others that he had agreed to return plaintiff his money with interest at 10 per cent in two years if he was dissatisfied with his bargain. There was evidence, which this had some tendency to corroborate, that the contract as translated by Jaudes contained such a provision. But if not admissible, the judgment should not be reversed on that account in view of the fact that there was sufficient evidence of fraudulent representations as to other matters to justify the recovery. The judgment will be affirmed.

AFFIRMED.

271 - 23616

THE OZONIZED OX MARROW COMPANY, a corporation,
Appellant,

vs.

M. L. BARRETT & COMPANY, a corporation,
Appellee.

211 I.A. 421

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant, the Ozonized Ox Marrow Company, brought an action for the value of a quantity of "washed oil of orange" delivered to the appellee. The court found the issues for the defendant, and from the judgment entered thereon plaintiff has prosecuted this appeal.

The statement of claim filed on behalf of plaintiff set forth that its claim was for "washed oil of orange sold and delivered as per sample to the defendant," etc. The affidavit of defense alleged substantially that plaintiff had offered to sell to the defendant a certain quantity of "oil of orange" at a certain price, at which time plaintiff submitted to defendant a sample of a substance which plaintiff informed defendant was "oil of orange," but that it was not at that time understood nor did the agreement contemplate a sale of a product like the sample, but that it was expressly represented by plaintiff that the product offered for sale was "oil of orange;" that thereafter defendant placed an order for 250 pounds of "oil of orange;" that defendant received from plaintiff 250 pounds of "washed oil of orange;" that thereupon, within a reasonable time, defendant notified plaintiff that the shipment was not in accordance with representations made,

THE OXONIANS OX NARROW COMPANY, a corporation,
Appellant,

vs.

M. L. BARNETT COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

I.A. 421

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant, the Oxonians Ox Narrow Company, brought an action for the value of a quantity of "washed oil of orange" delivered to the appellee. The court found the issues for the defendant, and from the judgment entered thereon plaintiff has prosecuted this appeal.

The statement of claim filed on behalf of plaintiff set forth that its claim was for "washed oil of orange sold and delivered as per sample to the defendant," etc. The affidavit of defense alleged substantially that plaintiff had offered to sell to the defendant a certain quantity of "oil of orange" at a certain price, at which time plaintiff submitted to defendant a sample of a substance which plaintiff informed defendant it was "oil of orange," but that it was not at that time understood nor did the agreement contemplate a sale of a product like the sample, but that it was expressly represented by plaintiff that the product offered for sale was "oil of orange;" that thereafter defendant placed an order for 250 pounds of "oil of orange;" that defendant received from plaintiff 250 pounds of "washed oil of orange;" that thereupon, within a reasonable time, defendant notified plaintiff that the shipment was not in accordance with representations made,

and that it was being held subject to plaintiff's orders; and that defendant has ever since been ready and willing to surrender it to plaintiff.

The evidence offered on behalf of the plaintiff tended to show that the shipment in question was not represented as "oil of orange" in its common acceptation, but as "oil of orange with something taken from it and something added to it;" that a sample thereof had been submitted to defendant, who, after an examination of the sample submitted, ordered 250 pounds thereof as per sample; that it was a sale by sample only, and that the commodity delivered was in every respect like the sample submitted.

On behalf of the defendant evidence was adduced tending to show that plaintiff had offered defendant "oil of orange" at $1.75 per pound, - a figure considerably lower than the then prevailing market price; that defendant agreed to purchase same at the said price provided it was "oil of orange" in accordance with the formula of the United States Pharmacopoeia, a recognized authority on chemical standards; that plaintiff submitted a sample thereof to the defendant which had the appearance and aroma of "oil of orange," whereupon defendant ordered 250 pounds of "oil of orange" for immediate delivery; that a few days later defendant received from plaintiff ten containers each containing 25 pounds of a substance known as "washed oil of orange," as indicated by the markings on the containers and as revealed by a chemical analysis; that thereupon defendant rejected the shipment, immediately notifying plaintiff that it was being held subject to its order. The evidence on behalf of defendant further showed that "washed oil of orange" is an entirely different product and greatly inferior to "oil of orange."

and that it was being held subject to plaintiff's orders; and that defendant has ever since been ready and willing to surrender it to plaintiff.

The evidence offered on behalf of the plaintiff tended to show that the shipment in question was not represented as "oil of orange" in the common acceptation, but as "oil of orange with something taken from it and something added to it;" that a sample thereof had been submitted to defendant, who, after an examination of the sample submitted, ordered 250 pounds thereof as per sample; that it was a sale by sample only, and that the commodity delivered was in every respect like the sample submitted.

On behalf of the defendant evidence was adduced tending to show that plaintiff had offered orders not "oil of orange" at $1.75 per pound, - a figure considerably lower than the then prevailing market price; that defendant agreed to purchase same at the said price provided it was "oil of orange" in accordance with the formula of the United States Pharmacopoeia, a recognized authority on chemical standards; that plaintiff submitted a sample thereof to the defendant which had the appearance and odors of "oil of orange," whereupon defendant ordered 250 pounds of "oil of orange" "on immediate delivery; that a few days later defendant received from plaintiff ten containers each containing 25 pounds of a substance known as "washed oil of orange," as indicated by the markings on the containers and as revealed by a chemical analysis; that thereupon defendant rejected the shipment, immediately notifying plaintiff that it was being held subject to its order. The evidence on behalf of defendant further showed that "washed oil of orange" is an entirely different product and greatly inferior to "oil of orange."

Plaintiff contends that the court erred in finding the issues for the defendant.

It is a well recognized principle of the law of sales that where goods are sold by sample and representation, the fact that they conform to the sample submitted is not sufficient, but they must be in accordance with the representation as well. (Wabash Canning Co. v. Nicholls, 187 Ill. App. 176 and cases there cited.) Plaintiff, while apparently conceding this, argues that the evidence clearly shows that this was a sale by sample only and that the commodity delivered to defendant conformed in every respect thereto, and that hence plaintiff was entitled to recover the value thereof. The court evidently based its holding upon defendant's theory, viz., that the sale in question was upon sample amd representation that the commodity sold was "oil of orange" and that plaintiff delivered "washed oil of orange" instead; consequently, unless we are prepared to hold that the finding of the court is clearly and manifestly against the weight of the evidence, it cannot be disturbed. The evidence on this point was conflicting and for this reason the credibility of the witnesses must have been a determining factor. In such a situation we cannot say that the finding of the court is clearly and manifestly against the weight of the evidence.

Complaint is also made of the admission of evidence of a custom in the chemical industry that the term "oil of orange" can refer to only one certain cmmmodity, viz., that conforming to the formula of the United States Pharmacopoeia, because the plaintiff was not in the chemical or drug business and therefore could not be charged with knowledge of any such custom even though it existed. However, the evidence on behalf of the defendant showed that

Plaintiff contends that the court erred in finding the issues for the defendant.

It is a well recognized principle of the law of sale that where goods are sold by sample and representation, the fact that they conform to the sample submitted is not sufficient, but they must be in accordance with the representation as well. (Wabash Counting Co. v. Nicholls, 187 Ill. App. 176 and cases there cited.) Plaintiff, while apparently conceding this, argues that the evidence clearly shows that this was a sale by sample only and that the commodity delivered to defendant conformed in every respect thereto, and that hence plaintiff was entitled to recover the value thereof. The court evidently based its holding upon defendant's theory, viz., that the sale in question was upon sample and representation that the commodity sold was "oil of orange" and that plaintiff delivered "wanton oil of orange" instead; consequently, unless we are prepared to hold that the finding of the court is clearly and manifestly against the weight of the evidence, it cannot be disturbed. The evidence on this point was conflicting and for this reason the credibility of the witnesses must have been a determining factor. In such a situation we cannot say that the finding of the court is clearly and manifestly against the weight of the evidence.

Complaint is also made of the admission of evidence of a custom in the chemical industry that the term "oil of orange" can refer to only one certain commodity, viz., that complained of in the formula of the United States Pharmacopoeia, because the plaintiff was not in the chemical or drug business and therefore could not be charged with knowledge of any such custom even though it existed. However, the evidence on behalf of the defendant showed that

plaintiff had expressly agreed to deliver "oil of orange" in conformity with said formula. Plaintiff is therefore in no position to complain of the admission of this evidence.

Other errors have been assigned which we need not discuss, save to say that they are without merit. There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

plaintiff had expressly agreed to deliver "oil of orange" in conformity with said formula. Plaintiff is therefore in no position to complain of the admission of this evidence.

Other errors have been assigned which we need not discuss, save to say that they are without merit. There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

297 - 23642

L. SANTOWSKY for use of Bank of Wisconsin, a corporation,
Appellee,

vs.

FIRST NATIONAL BANK OF CHICAGO and

CHICAGO METAL REFINING COMPANY, a corporation,
Intervening Petitioner,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 422

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment against the First National Bank of Chicago in a garnishment proceeding brought for the use of the Bank of Wisconsin, in which the Chicago Metal Refining Company filed a petition as intervening claimant.

Prior to the bringing of the garnishment proceeding the said Bank of Wisconsin had recovered a judgment for upwards of $2,000 against Louis Santowsky, upon which execution was issued and returned no part satisfied. Subsequently the First National Bank of Chicago was served as garnishee. Answers to interrogatories propounded to it revealed that at the time it was served as garnishee there stood to the credit of the said Santowsky the sum of $941.71, being a balance of a checking account, subject to prior assignment thereof from the said Santowsky to the said Chicago Metal Refining Company, which sum the said bank had since paid in full to the said Chicago Metal Refining Company. On motion of the appellee, the said Chicago Metal Refining Company was made a party to the suit as intervening claimant to the said fund.

297 - 23642

L. BARTOMOEY for use of Bank of Wisconsin, a corporation, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
FIRST NATIONAL BANK OF CHICAGO and CHICAGO METAL HEATING COMPANY, a corporation, Intervening Petitioner, Appellants.	

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment against the First National Bank of Chicago in a garnishment proceeding brought for the use of the Bank of Wisconsin, in which the Chicago Metal Heating Company filed a petition as intervening claimant.

Prior to the filing of the garnishment proceeding, the said Bank of Wisconsin recovered a judgment for upwards of $2,000 against Louis Gartowsky, upon which execution was issued and returned nulla bona. Thereupon the First National Bank of Chicago was served as garnishee. Answers to interrogatories propounded to it were [illegible] it was alleged as follows: That at the time of the said Gartowsky the sum of $[illegible], being a balance of a checking account, subject to payment upon the order of the said Gartowsky to the said L. Bartomoey, [illegible] banking corporation, was the said bank had since paid in full to the said Chicago Metal Heating Company. In addition of the appellee, the said Chicago Metal Heating Company was made a party to the suit as intervening claimant to the said fund.

At the close of all the evidence the court found the issues for appellee and ordered the said First National Bank of Chicago to pay over to the said Santowsky for the use of the Bank of Wisconsin, the said sum of $941.71.

It is contended that the court erred in its findings and in ordering said fund paid to the said Santowsky for the use of the said Bank of Wisconsin.

The action of the court in so finding and ordering was based upon the theory that the purported assignment of the fund from the said Santowsky to the said Chicago Metal Refining Company was void as being in fraud of creditors and without consideration. From a careful examination of the record, we are of the opinion that the theory of the trial court was amply sustained by the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

At the close of all the evidence the court found the issues for appellee and ordered the said First National Bank of Chicago to pay over to the said Sentowsky for the use of the Bank of Wisconsin, the said sum of $941.71.

It is contended that the court erred in its findings and in ordering said fund paid to the said Sentowsky for the use of the said Bank of Wisconsin.

The action of the court in so finding and ordering was based upon the theory that the purported assignment of the fund from the said Sentowsky to the said Chicago Metal Refining Company was void as being in fraud of creditors and without consideration. From a careful examination of the record, we are of the opinion that the theory of the trial court was amply sustained by the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

(2)

323 - 23668

211 I.A. 430

THE J. L. MOTT IRON WORKS,
a corporation,
Appellee,

vs.

NATHAN ROSENZWEIG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1902.05 rendered in an action on a promissory note, in which appellant, Nathan Rosenzweig, was sued as indorser and his co-defendant, the Maimonides Hospital, as maker; the appeal being prosecuted by Nathan Rosenzweig alone.

The sole question presented for determination is whether or not the trial court erred in sustaining an objection to certain evidence offered on behalf of the appellant. The evidence tendered related to an agreement alleged to have been made by appellee with the said hospital some time prior to the execution of the note in question, to the effect that in consideration of the sum of $300 appellant, who was a plumbing contractor, was to permit certain plumbing supplies used in the construction of the said hospital, to be ordered and shipped in his name, and was to be made payee of the note herein sued upon, which said note was to be indorsed by him and given in payment of the said supplies, and that no liability was to be incurred by him on said note. In our opinion, this evidence was properly excluded. The general rule is, that the name of the payee on the back of a note is evidence that he is an indorser and proves that he has assumed the liability of an indorser, as fully as if the agreement had been

323 - 25668

THE I. L. MOTT IRON WORKS,
a corporation,
Appellee,

vs.

NATHAN ROSENZWEIG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1802.05 rendered in an action on a promissory note, in which appellant, Nathan Rosenzweig, was sued as indorser and his co-defendant, the Maimonides Hospital, as maker; the appeal being prosecuted by Nathan Rosenzweig alone.

The sole question presented for determination is whether or not the trial court erred in sustaining an objection to certain evidence offered on behalf of the appellant. The evidence tendered related to an agreement alleged to have been made by appellee with the said hospital some time prior to the execution of the note in question, to the effect that in consideration of the sum of $500 appellant, who was a plumbing contractor, was to permit certain plumbing supplies used in the construction of the said hospital, to be ordered and shipped in his name, and was to be made payee of the note herein sued upon, which said note was to be indorsed by him and given in payment of the said supplies, and that no liability was to be incurred by him on said note. In our opinion, this evidence was properly excluded. The general rule is, that the name of the payee on the back of a note is evidence that he is an indorser and proves that he has assumed the liability of an indorser, as fully as if the agreement had been

written out in words. Parol evidence is no more admissible to contradict or vary this contract than any other contract. Johnson v. Glover, 121 Ill. 283.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

written out in words. Parol evidence is no more admissible to contradict or vary this contract than any other contract. Johnson v. Glover, 121 III. 283.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

249 - 23594

AUTO PARTS COMPANY, a corporation, Appellee, vs. JOSEPH SILVERSTEIN and SAM GOODMAN, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

211 I.A. 436

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered by the court in favor of the complainant, the Auto Parts Company, a corporation of Illinois, which sued appellants Joseph Silverstein and Sam Goodman as copartners.

The bill of complaint charged unfair competition. It alleged that complainant, an Illinois corporation, was for many years engaged in the business of buying and selling secondhand automobiles, parts, supplies, etc.; that by the expenditure of large sums of money for advertising and by fair dealing, a large and lucrative business was acquired by it in the United States and foreign countries; that the defendants Silverstein and Goodman afterwards became associated in a similar business taking the firm name and style of "Auto Sales and Parts Company"; that the name was so similar to that of complainant as to cause customers of complainant to believe while dealing with defendants that they were dealing with complainant; that defendants were notified of the confusion resulting from the use of this name, but nevertheless continued so to use it and were doing so for the purpose of causing confusion and for the fraudulent purpose of misleading complainant's customers.

249 - 23694

AUTO PARTS COMPANY, a corporation,
Appellee,

vs.

JOSEPH SILVERSTEIN and SAM GOODMAN,
Appellants.

APPEAL FROM
SUPREME COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered by the court in favor of the complainant, the Auto Parts Company, a corporation of Illinois, which sued up clients Joseph Silverstein and Sam Goodman as copartners.

The bill of complaint charges unfair competition. It alleged that complainant, an Illinois corporation, was for many years engaged in the business of buying and selling secondhand automobiles, parts, supplies, etc.; that by the expenditure of large sums of money for advertising and by fair dealing, a large and lucrative business was acquired by it in the United States and foreign countries; that the defendants Silverstein and Goodman afterwards became associated in a similar business taking the firm name and style of "Auto Sales and Parts Company"; that the name was so similar to that of complainant as to cause customers of complainant to believe while dealing with defendants that they were dealing with complainant; that defendants were notified of the confusion resulting from the use of this name, but nevertheless continued so to use it and were doing so for the purpose of causing confusion and for the fraudulent purpose of misleading complainant's customers.

The answer of the defendants denied that the name "Auto Sales & Parts Company" was similar to that of "Auto Parts Company" and denied that confusion resulted from the use of the same, or that they were guilty of the unfair dealing as charged.

The cause was referred to a master who in his report found the business of complainant was begun in 1906 and incorporated two years thereafter; that it had grown until in the year 1915, its business totaled $730,000; that it was the largest concern in the world selling auto parts and had an excellent reputation for square dealing and good service; that the defendants originally conducted a junk business which later was combined with the sale of auto parts and accessories as one business, and that the business transacted by them amounted to about $25,000 per year; that there was confusion as to the identity of the two organizations; that the resemblance of the names was calculated to deceive the ordinary, everyday person; that defendants had not acted in good faith; that orders sent through the mail were mixed and confused; that people had been and were likely to be induced to deal with the Auto Sales & Parts Company with the idea that they were purchasing goods of the Auto Parts Company and defendants had so conducted themselves as to aid in this deception. The report recommended an injunction and the chancellor entered a decree in accordance with its recommendations and the prayer of the bill.

The law applicable to cases of this kind has been often announced. A corporation in business is entitled to protection in the use of the name under which it is incorporated to the same extent as an individual would be entitled to protection in the use of his individual name. The right to this protection is recognized in statutes of

The answer of the defendants denied that the name "Auto Sales & Parts Company" was similar to that of "Auto Parts Company" and denied that confusion resulted from the use of the same, or that they were guilty of the unfair dealing as charged.

The cause was referred to a master who in his report found the business of complainant was begun in 1906 and incorporated two years thereafter; that it had grown until in the year 1915, its business totaled $750,000; that it was the largest concern in the world selling auto parts and had an excellent reputation for square dealing and good service; that the defendants originally conducted a junk business which later was combined with the sale of auto parts and accessories as one business, and that the business transacted by them amounted to about $25,000 per year; that there was confusion as to the identity of the two organizations; that the resemblance of the names was calculated to deceive the ordinary, everyday person; that defendants had not acted in good faith; that orders went through the mail were mixed and confused; that people had been and were likely to be induced to deal with the Auto Sales & Parts Company with the idea that they were purchasing goods of the Auto Parts Company and defendants had so connected themselves as to aid in this deception. The report recommended an injunction and the chancellor entered a decree in accordance with its recommendations and the prayer of the bill.

The law applicable to cases of this kind has been often announced. A corporation in business is entitled to protection in the use of the name under which it is incorporated to the same extent as an individual would be entitled to protection in the use of his individual name. The right to this protection is recognized in statutes of

the state, Hurd's Revised Statutes, Chap. 32, Sec. 2, and in the decisions of the courts. Merchants' Detective Ass'n. v. Detective Mercantile Agency, 25 Ill. App. 250; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n. et al., 246 Ill. 416. While names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, (The Elgin Butter Co. v. The Elgin Creamery Company et al., 155 Ill. 127) nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y. W. C. A. v. Y. W. C. A., 194 Ill. 194; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n., 246 Ill. 416. One cannot use even his own name in such a manner as to deceive. Allegretti et al., v. Allegretti Chocolate Cream Company, 177 Ill. 129. It is also the law that irrespective of fraudulent intent, or actual injury, it is the duty of a subsequent trader to adopt affirmative precautions sufficient to make confusion and deception improbable. 28 Amer. & Eng. Ency. of Law, p. 422-3, and cases there cited.

The particular facts and circumstances which appear in evidence in each case determine whether relief can or cannot be granted.

Appellants urge that the evidence is insufficient to support the findings of the master and the decree entered by the court and claim that a search of the entire evidence fails to show a single instance of false representation.

We have given the evidence careful consideration. While it is true as appellants urge that fraud is never

the state, Hurd's Revised Statutes, Chap. 32, Sec. 2, and in the decisions of the courts. Merchants' Detective Ass'n. v. Detective Mercantile Agency, 28 Ill. App. 290; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n. et al., 246 Ill. 416. While names which are generic terms or merely descriptive are the common property of the public, and a private property interest therein cannot be acquired, (The Elgin Butter Co. v. The Elgin Creamery Company et al., 188 Ill. 127) nevertheless, the courts will grant relief where a name of this kind has been adopted under circumstances which make it appear that the purpose of adopting such name was to mislead the general public. International Com. Y. M. C. A. v. Y. M. C. A., 194 Ill. 194; The Mount Hope Cemetery Ass'n. v. The New Mount Hope Cemetery Ass'n., 246 Ill. 418. One cannot use even his own name in such a manner as to deceive. Allegretti et al., v. Allegretti Chocolate Cream Company, 177 Ill. 129. It is also the law that irrespective of fraudulent intent, or actual injury, it is the duty of a subsequent trader to adopt affirmative precautions sufficient to make confusion and deception impossible. 28 Amer. & Eng. Ency. of Law, p. 422-3, and cases there cited.

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Appellants urge that the evidence is insufficient to support the findings of the master and the decree entered by the court and claim that a search of the entire evidence fails to show a single instance of false representation.

We have given the evidence careful consideration.

While it is true as appellants urge that fraud is never

presumed and must always be clearly proved, we think there is evidence in this record from which the chancellor could properly find a fraudulent intention. The name adopted by the defendants was one well calculated to lead to confusion and deceive the customers of complainant. The use of the name resulted in confusion. This is established by the testimony of the post office employee who was in charge of distributing the mail of these two concerns. The complainant was the older company, doing a larger business. It had been established for many years and had expended large sums of money in advertising. The defendants began to transact a similar business. This they had a perfect right to do, but there is no sufficient explanation in this record as to their reason for deliberately choosing a name so similar to that of the larger and older concern, and their insistence upon using it other than the desire on their part to appropriate to their own use the good will and business of appellee.

We have searched the record in vain for facts from which an innocent intention might be inferred. The findings of the master when approved as here by the chancellor are entitled to great weight. We have no right to set them aside unless they are clearly and manifestly against the weight of the evidence. Champion et al. v. McCarthy, 228 Ill. 87; Day v. Wright, 233 Ill. 218.

We cannot in this case say that these findings are contrary to the weight of the evidence, but on the contrary think the evidence clearly tends to establish the intention of appellants to deceive and defraud. At any rate it is established defendants failed as subsequent traders doing a similar business to that of appellee, to fulfill the duty which the law cast upon them to adopt affirmative

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We have searched the record in vain for facts from which an innocent intention might be inferred. The findings of the master which approved as here by the chancellor are entitled to great weight. We have no right to set them aside unless they are clearly and manifestly against the weight of the evidence. Chamberlin et al. v. Lakeshire, 258 Ill. 87; Day v. Wright, 258 Ill. 216.

We cannot in this case say that these findings are contrary to the weight of the evidence, but on the contrary think the evidence clearly tends to establish the intention of appellants to deceive and defraud. At any rate it is established defendants failed on subsequent trafficking doing a similar business to that of appellee, to fulfill the duty which the law cast upon them to adopt affirmative

precautions sufficient to make deception improbable. Whether on the ground of this neglect of duty, or active fraud, the decree is sustained by the evidence.

Objection is made by appellants to the costs taxed for master's fees. It appears from the amended certificate of the master he had taken 8,266 folios of testimony of which 405 folios were written by the stenographer and 7,861 folios were documentary. The statutory charge therefor would amount to $1239.90. The master asked that the fees "to be fixed by the court" for drafting report etc. be taxed at the sum of $150.00. The court after hearing the evidence fixed the total allowance for master's charges in the case at $447.60. As this was much less than the statutory fees for taking and reporting the evidence, we think appellants have no just cause to complain. We do not think there was error either in the taxing of these fees, or in the further reference to the master.

For the reasons indicated the decree of the trial court will be affirmed.

AFFIRMED.

precautions sufficient to make deception improbable. Whether on the ground of this neglect of duty, or active fraud, the decree is sustained by the evidence.

Objection is made by appellants to the costs taxed for master's fees. It appears from the amended certificate of the master he had taken 8,286 folios of testimony of which 405 folios were written by the stenographer and 7,881 folios were documentary. The statutory charge therefor would amount to $1239.90. The master asked that the fees "to be fixed by the court" for drafting report etc. be taxed at the sum of $150.00. The court after hearing the evidence fixed the total allowance for master's charges in the case at $447.50. As this was much less than the statutory fees for taking and reporting the evidence, we think appellants have no just cause to complain. We do not think there was error either in the taxing of these fees, or in the further reference to the master.

For the reasons indicated the decree of the trial court will be affirmed.

AFFIRMED.

285 - 23630

EDSON R. GILBERT and WILLIAM H. DUNN,
Appellants,

vs.

ROBERT M. SWEITZER, County Clerk of Cook County, et al.,
Appellees.

211 I.A. 438

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainants and appellants Edson R. Gilbert and William H. Dunn, filed their bill of complaint in the Superior Court of Cook County, March 30, 1917. They sued as citizens and tax payers to enjoin defendants and appellees Robert M. Sweitzer as County Clerk of Cook County and Henry Stuckart as County Treasurer of said county from taking action towards the payment of any money out of the public funds of Cook County for salaries to 115 persons holding the positions of Probation Officers in the Juvenile Court of Cook County.

The bill sets up at length the provisions of the Constitution of Illinois, Article 10, Section 9, and Hurd's Rev. Statutes, Chap. 25, Sec. 22, with reference to the powers and duties of clerks of courts of Cook County, and the duty of the judges of the Circuit Court to fix the number of deputies or assistants of the court each year.

It alleges that on December 12, 1916, the judges of the Circuit Court entered an order by which they allowed to the Clerk of the Circuit Court of Cook County as ex-officio Clerk of the Juvenile Court in said County, deputies and assistants to the number of 12, specified in said order as vault clerk, bookkeeper, chief clerk, minute clerk, record

MADSON R. GILBERT and WILLIAM R. DUNN, Appellants,	APPEAL FROM SUPREME COURT, COOK COUNTY.
vs.	
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The bill sets up at length the provisions of the Constitution of Illinois, Article IV, Section 9, and Hurd's Rev. Statutes, Chap. 25, Sec. 22, with reference to the powers and duties of clerks of courts of Cook County, and the duty of the judges of the Circuit Court to fix the number of deputies or assistants of the court each year.

It alleges that on December 14, 1916, the judges of the Circuit Court entered an order by which they allowed to the Clerk of the Circuit Court of Cook County as ex-officio clerk of the Juvenile Court in said County, deputies and assistants to the number of 12, specified in said order as vault clerk, bookkeeper, chief clerk, minute clerk, record

writers, decree writers, filing and process clerk and file and docket clerk; that in and by the same order the said judges directed in substance and effect that offices should exist during said fiscal year beginning December 1, 1916, and ending November 30, 1917, in connection with the Juvenile Court in said Cook County, and the officers were named as follows: seventy seven "Assistant Probation Officers"; one was named "Director of Juvenile Psychopathic Institute"; one as "Assistant Director Juvenile Psychopathic Institute"; two "Junior Stenographers Psychopathic Institute"; one "Woman Probation Officer (a lawyer) who shall act as assistant to Judge of the Juvenile Court"; three "Assistant Probation Officers - Court Stenographers"; five "Junior Stenographers"; five "Junior Typists"; one "Chief Probation Officer"; one "Deputy Chief Probation Officer"; five "Probation Department Clerks"; one "Assistant Probation Officer - secretary to the "Judge"; five "Assistant Probation Officers - Heads of Divisions"; one "Assistant Probation Officer - for foreign languages"; one "Assistant Probation Officer - Interpreter"; one "Assistant Probation Officer - nurse"; two "Assistant Probation Officers - to place and supervise delinquent boys on farms"; one "Assistant Probation Officer - to handle contempt cases"; one "Assisant Probation Officer - special work"; that the said order was made under and by virtue of a certain statute entitled "An Act to regulate the Treatment and Control of Dependent, Neglected and Delinquent Children", approved April 21, A. D. 1899, as amended, commonly known as the "Juvenile Court Act," Hurd's Illinois Revised Statutes, Chap. 23, Sec. 174; that the clerk of the Circuit Court made no petition for the appointment of these officers or

writers, decree writers, filing and process clerk and file and docket clerk; that in and by the same order the said Judges directed in substance and effect that offices should exist during said fiscal year beginning December 1, 1918, and ending November 30, 1919, in connection with the Juvenile Court in said Cook County, and the officers were named as follows: seventy seven "Assistant Probation Officers"; one was named "Director of Juvenile Psychopathic Institute"; one as "Assistant Director Juvenile Psychopathic Institute"; two "Junior Stenographer Psychopathic Institute"; one "Woman Probation Officer (a lawyer) who shall act as assistant to Judge of the Juvenile Court"; three "Assistant Probation Officers - Court Stenographers"; five "Junior Stenographers"; five "Junior Typists"; one "Chief Probation Officer"; one "Deputy Chief Probation Officer"; five "Probation Department Clerks"; one "Assistant Probation Officer - necessary to the Judge"; five "Assistant Probation Officers - Heads of Divisions"; one "Assistant Probation Officer - for foreign language"; one "Assistant Probation Officer - Interpreter"; one "Assistant Probation Officer - nurse"; two "Assistant Probation Officers - to place and supervise delinquent boys on farms"; one "Assistant Probation Officer - to handle contempt cases"; one "Assistant Probation Officer - special work"; that the said order was made under and by virtue of a certain statute entitled "An act to regulate the treatment and control of Dependent, Neglected and Delinquent Children", approved April 21, A. D. 1899, as amended, commonly known as the "Juvenile Court Act," Hurd's Illinois Revised Statutes, Chap. 23, sec. 174; that the clerk of the Circuit Court made no petition for the appointment of these officers or

employees; that said appointments were made by the judges of the Circuit Court pursuant to the recommendation of a committee of said judges, a copy of which is attached to the bill and made a part thereof, marked "Exhibit A".

That on February 19th, 1917, the Board of Commissioners of Cook County, passed their annual appropriation bill in and by which they fixed the salaries of said offices amounting to the total sum of $154,680.00, and appropriated that sum with which to pay the salaries of these officers as they should become due, out of the public funds of said Cook County; that defendant Sweitzer as County Clerk had issued warrants for the payment to the persons holding said positions of these salaries for the latter half of the month of March, 1917, and that Henry Stuckart as County Treasurer was about to counter-sign and pay said warrants out of the public funds; that the said Juvenile Court is a part of the Circuit Court of Cook County; that it is the statutory duty of the clerk to attend all its sessions, not excepting the "Juvenile Court" and keep the records thereof and all other duties pertaining to said office of clerk; that said order of December 12th entered by said judges is without warrant of law, and the appropriation of the said County Board also is without warrant of law; that a considerable part of the duties conferred on the clerk of the Circuit Court by law had been taken from him so far as the Juvenile Court is concerned, and entrusted to said named offices; that this has resulted in a duplication of clerks and necessitated a large increase in the amount of space required in which to keep the files and records of said Circuit Court, including the Juvenile Branch thereof; that a part of the said records are kept

employees; that said appointments were made by the judges of the Circuit Court pursuant to the recommendation of a committee of said judges, a copy of which is attached to the bill and made a part thereof, marked "Exhibit A".

That on February 15th, 1917, the Board of Commissioners of Cook County, passed their annual appropriation bill in and by which they fixed the salaries of said officers amounting in the total sum of $184,680.00, and appropriated that sum with which to pay the salaries of these officers as they should become due, out of the public funds of said Cook County; that defendant Switzer as County Clerk had issued warrants for the payment to the persons holding said positions of these salaries for the latter half of the month of March, 1917, and that Henry Stuckart as County Treasurer was about to countersign and pay said warrants out of the public funds; that the said Juvenile Court is a part of the Circuit Court of Cook County; that it is the statutory duty of the clerk to attend all its sessions, not excepting the "Juvenile Court" and keep the records thereof and all other notice pertaining to said of ice of clerk; that said order of December 15th entered by said judges is without warrant of law, and the appropriation of the said County Board also is without warrant of law; that a considerable part of the duties conferred on the clerk of the Circuit Court by law had been taken from him so far as the Juvenile Court is concerned, and entrusted to said named officers; that this has resulted in a duplication of clerks and necessitated a large increase in the amount of space required in which to keep the files and records of said Circuit Court, including the Juvenile Branch thereof; that a part of the said records are kept

secret and are not open to the inspection of the public as required by law; that "your orators" are advised and believe that the said statutory provision for the multiplication of probation officers is unconstitutional and void as construed in Witter v. Cook County Commissioners, 256 Ill. 616; that the power of appointment of all probation officers in said Juvenile Court is vested solely in the judges of the Circuit Court of Cook County, and that the Board of Commissioners of Cook County have no power whatever in reference thereto.

The foregoing allegations of the bill are contained in paragraphs 1 to 17 thereof. Paragraphs 18 to 23 allege that the statute in question violates section 3 of the Constitution of Illinois, also section 22 of Article 4 of said Constitution, and also section 29 of Article 6 of the Constitution of Illinois; that the said statute is void as against public policy; that the necessary and inevitable effect thereof is to corrupt and degrade the office of Judge of said Circuit Court of Cook County by putting it in the power of said judges to create an unlimited number of such probation officerships with suitable salaries payable out of the funds of Cook County, and distribute them as rewards for services; that the statute is further unconstitutional in that the office of probation officer is in violation of the Bill of Rights, in that said statute purports "to empower such probation officer arbitrarily to take any child in said Cook County from its parents and arbitrarily deprives such child of its liberty, and arbitrarily to keep said child confined and imprisoned for an indefinite time, without said child having been charged with or being guilty of, any crime or offense whatever, and without said child having been tried by a jury of its peers, and without due process of law, and without bail." That it is further against public policy in that its

secret and are not open to the inspection of the public as required by law; that "your orators" are advised and believe that the said statutory provision for the multiplication of probation officers is unconstitutional and void as construed in Ritter v. Cook County Commissioners, 296 Ill. 616; that the power of appointment of all probation officers in said Juvenile Court is vested solely in the judges of the Circuit Court of Cook County, and that the Board of Commissioners of Cook County have no power whatever in reference thereto.

The foregoing allegations of the bill are contained in paragraphs 1 to 17 thereof. Paragraphs 18 to 23 allege that the statute in question violates section 3 of the Constitution of Illinois, also section 22 of article 4 of said Constitution, and also section 29 of article 6 of the Constitution of Illinois; that the said statute is void as against public policy; that the necessary and inevitable effect thereof is to corrupt and degrade the office of Judge of said Circuit Court of Cook County by putting it in the power of said judges to create an unlimited number of such probation officers with suitable salaries payable out of the funds of Cook County, and distribute them as rewards for services; that the statute is further unconstitutional in that the office of probation officer is in violation of the Bill of Rights, in that said statute purports "to empower such probation officer arbitrarily to take any child in said Cook County from its parents and arbitrarily deprives such child of its liberty, and arbitrarily to keep said child confined and imprisoned for an indefinite time, without said child having been charged with or being guilty of, any crime or offense whatever, and without said child having been tried by a jury of its peers, and without due process of law, and without bail." That it is further against public policy in that its

necessary effect is to increase the number of cases in which children are torn from the homes of their parents and turned over to strangers or institutions that have no interest whatever in their welfare; that such probation officers being removable whenever they incur the displeasure of the judge work incessantly to drum up fresh cases for said court in order to "hold their jobs" and increase the number of probation officerships that the judge thereof feels justified in asking at the end of each fiscal year.

Complainants are advised and believe there is no warrant of law for the creation by said judges of the Circuit Court of Cook County of the so-called office of "Director Juvenile Psychopathic Institute" and that there is no warrant of law for the payment of salaries appropriated for said officers.

To this bill the defendants on April 18, 1917, filed a plea and demurrer and in their plea set forth that as to paragraphs 18 to 23 inclusive of complainants bill, on and before the commencement of this suit, one of the complainants William H. Dunn, had filed his bill in chancery against Robert M. Sweitzer as County Clerk and ex-officio comptroller of the County of Cook, Peter Bartzen, then president of the Board of Commissioners of the County of Cook and William O'Connell, County Treasurer of the County of Cook and the predecessor in office of Henry Stuckart, County Treasurer of Cook County, charging that the act referred to in complainants' bill was void and unconstitutional for the various reasons now charged and alleged, and praying relief against the defendants in the same manner and for the same matters and to the same effect as complainants now pray by their present bill; that the defendants in said

necessary effect is to increase the number of cases in which children are torn from the homes of their parents and turned over to strangers or institutions that have no interest whatever in their welfare; that such probation officers being removable whenever they incur the displeasure of the judge work incessantly to drum up fresh cases for said court in order to "hold their jobs" and increase the number of probation officerships that the judge thereof feels justified in asking at the end of each fiscal year.

Complainants are advised and believe there is no warrant of law for the creation by said judges of the Circuit Court of Cook County of the so-called office of "Director Juvenile Psychopathic Institute" and that there is no warrant of law for the payment of salaries appropriated for said officers.

To this bill the defendants on April 13, 1917, filed a plea and demurrer and in their plea set forth that as to paragraphs 18 to 23 inclusive of complainants bill, on and before the commencement of this suit, one of the complainants William J. Dunn, had filed his bill in chancery against Robert E. Swallner as County Clerk and ex-officio comptroller of the County of Cook, Peter Burton, then president of the Board of Commissioners of the County of Cook and William O'Connell, County Treasurer of the County of Cook and the predecessor in office of Henry Lenkart, County Treasurer of Cook County, charging that the act referred to in complainants' bill was void and unconstitutional for the various reasons now charged and alleged, and praying relief against the defendants in the same manner and for the same matters and to the same effect as complainants now pray by their present bill; that the defendants in said

cause had filed a joint and several demurrer to said bill and that a final decree had been entered therein dismissing said bill for want of equity; that an appeal had been allowed complainants to the Supreme Court of Illinois, but that the same had not been perfected and that said decree was a bar, and defendants pleaded same to said paragraphs of the bill of complaint and demanded the judgment of the court whether they should be compelled to make any answer to said paragraphs.

As to the remainder of the bill, the defendants filed a joint general demurrer. The plea was set down for hearing with the demurrer and said plea and demurrer was each sustained and the bill dismissed for want of equity.

Appellants have presented many authorities tending as they think to show that the decree entered in the former suit is not a bar to this action for the reason as it is argued that the demurrer to the first bill was sustained because the bill in that case had been prematurely filed and there was, therefore, no adjudication on the merits such as to bar a new suit.

They also argue (citing authorities) that the former decree does not amount to an adjudication because the parties to these suits are not the same, either as to plaintiffs or defendants. It will be noted the plea was filed only to those certain parts of the bill, in which the Juvenile Court Act is said to be unconstitutional and void.

It is not necessary for us to consider these questions thus raised by appellants for the reason that if it was the desire of appellants to argue these constitutional questions, they have chosen the wrong forum. By appealing to this court appellants waived all questions as to

cause had filed a joint and several demurrer to said bill and that a final decree had been entered therein dismissing said bill for want of equity; that an appeal had been allowed complainants to the Supreme Court of Illinois, but that the same had not been perfected and that said decree was a bar, and defendants pleaded same to said paragraphs of the bill of complaint and demanded the judgment of the court whether they should be compelled to make any answer to said paragraphs.

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It is not necessary for us to consider these questions thus raised by appellants for the reason that if it was the desire of appellants to argue these constitutional questions, they have chosen the wrong forum. By appealing to this court appellants waived all questions as to

the constitutionality of the statute. Luken v. L. S. & M. S. Ry. Co., 248 Ill. 377; Sixby v. Chicago City Ry. Co., 260 Ill. 478; P. C., C. & St. L. Ry. Co. v. Chicago, 242 Ill. 178; French v. The Cloverleaf Mining Co., 190 Ill. App. 400.

The only other question, therefore, which it is necessary for us to decide is whether after the plea was sustained, and those parts of the bill to which it was interposed eliminated, the remainder of the bill stated a cause of action. The statute in pursuance to which it is alleged these offices were created, has been construed and held constitutional by the Supreme Court in the case of Witter v. Cook County Comm., 256 Ill. 616. It was there said -

> "The Juvenile Court exercises a jurisdiction of the Court of Chancery which is of very ancient origin, and which extends to the care of the persons of infants within the jurisdiction and to their protection and education. This court long ago declared it to be a power, which exists in every well regulated society, to see that infants within the jurisdiction of the court are not abused, defrauded or neglected, and that they shall be reared and educated under such influences as will make them good citizens, and that this power is vested in the Court of Chancery, representing the government. The parental care of the State is administered by the Juvenile Court, and that court performs a purely judicial function in the hearing of causes brought before it. The infant is not brought before the court as a defendant charged with an infraction of the laws, but is brought within the jurisdiction of the court to receive its care and protection. * * * * It would be impossible for the court to make personal investigation of each case so as to act intelligently, and it is essential that the court act only upon a thorough investigation of the facts and a consideration of every circumstance that will enable the court to enter a just decree. Accordingly it has been deemed wise to provide by statute for one or more assistants to the court under the name of probation officers."

While in the order which provided for the appointment of these officers one was designated as "Director Juvenile Psychopathic Institute", another "Assistant Director Juvenile Psychopathic Institute" and another as "Assistant to Judge,

the constitutionality of the statute. Ingham v. L. & N. R. Ry. Co., 248 Ill. 377; Mixby v. Chicago City Ry. Co., 260 Ill. 478; K. C., C. & St. L. Ry. Co. v. Chicago, 242 Ill. 178; Fromen v. The Chicorical Mining Co., 190 Ill. App. 400.

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> "The Juvenile Court exercises a jurisdiction of the Court of Chancery which is of very ancient origin, and which extends to the care of the persons of infants within the jurisdiction and to their protection and education. This court long ago declared it to be a power, which exists in every well regulated society. To see that infants within the jurisdiction of the court are not abused, defrauded or neglected, and that they shall be trained and educated under such influences as will make them good citizens, and that this power is vested in the Court of Chancery, rests upon the government. The parental care of the State is administered by the Juvenile Court, and that court performs a purely judicial function in the hearing of causes brought before it. The infant is not brought before the court as a defendant charged with an infraction of the law, but is brought within the jurisdiction of the court to receive the care and protection. * * * It would be impossible for the court to make personal investigation of each case so as to act intelligently, and it is essential that the court act only upon a thorough investigation of the facts and a consideration of every circumstance that will enable the court to act. Therefore, accordingly it has been deemed wise to provide by statute for one or more assistants to the court under the name of probation officers."

While in the order which provided for the appointment of these officers one was designated as "Director Juvenile Psychopathic Institute", another "Assistant Director Juvenile Psychopathic Institute" and another as "Assistant to Judge,

Female Probation Officer, a lawyer", etc. we think it clearly appears from the allegations of the bill that these were simply names descriptive of the duties which eachprobation officer would be expected to fulfill and were adopted into the order of the court from the report of the committee of the judges who had examined into the necessities for the appointment of such officers. It would be strange, indeed, if in a court passing upon such a large number of cases with all the varied circumstances of those coming before it, so strict an interpretation should be put upon the law as to prevent the division of labor among the probation officers appointed which is necessary to secure the best possible results.

If wrongs exist in the administration of this court such as are stated (entirely as conclusions of the pleader) in complainants' bill, the law provides well known and sufficient remedies whereby all such wrongs may be set right, but these are not by way of injunction against the payment of the salaries of the duly constituted officers of the court.

The decree will be affirmed.

AFFIRMED.

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If wrongs exist in the administration of this court such as are stated (entirely as conclusions of the pleader) in complainants' bill, the law provides well known and sufficient remedies whereby all such wrongs may be set right, but these are not by way of injunction against the payment of the salaries of the duly constituted officers of the court.

The decree will be affirmed.

AFFIRMED.

337 - 23682

211 I.A. 439

ANDREW P. GUSTAVSON,
Appellee,

vs.

GEORGE C. HESTER,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant below appeals from a judgment for plaintiff entered by the court upon the verdict of a jury.

Plaintiff sued for personal injuries alleged to be the result of negligence of the defendant in the management and control of an automobile driven on a public highway. The declaration also set up an alleged violation by defendant of the statute of the state in regard to speed.

The evidence for plaintiff tended to show plaintiff's automobile was being driven in a southernly direction on a public street known as Sheridan Road by plaintiff's son who was a minor living with the plaintiff and that the plaintiff was riding in the rear seat of the automobile; that the defendant's automobile was being driven by the defendant north on Sheridan Road at a speed of 30 to 35 miles per hour; that while thus driving defendant attempted to pass an electric car in front of him and collided with it, causing him to turn across Sheridan Road toward the west or left hand side, resulting in a collision with the plaintiff's automobile by which plaintiff was severely injured.

The witnesses for the defendant testified that while defendant was driving his automobile north at a speed of about 13 to 14 miles per hour and at about the time he

337 - 23082

EDWARD F. GUSTAVSON,

Appellee,

vs.

GEORGE C. HEFTON,

Appellant.

APPEAL FROM
CIRCUIT COURT,
C O O K COUNTY.

MR. JUSTICE MACHUNDT DELIVERED THE OPINION OF THE COURT.

Defendant below appeals from a judgment for plaintiff entered by the court upon the verdict of a jury.

Plaintiff sues for personal injuries alleged to be the result of negligence of the defendant in the management and control of an automobile driven on a public highway. The declaration also set up an alleged violation by defendant of the statute of the state in regard to a cow.

The evidence for plaintiff tended to show plaintiff's automobile was being driven in a southerly direction on a public street known as Sheridan Road by plaintiff's son who was a minor living with the plaintiff and that the plaintiff was riding in the rear seat of the automobile; that the defendant's auburn hair was blown by the defendant motor on Sheridan road at a speed of 35 to 45 miles per hour; that while that driver defendant attempted to pass an electric car in front of him and collided with it, causing him to turn across Sheridan road to north his west or left hand side, resulting in a collision with the plaintiff's automobile by which plaintiff was severely injured.

The witnesses for the defendant testified that while defendant was driving his automobile north on a speed of about 12 to 14 miles per hour and at about the time he

was to have passed the electric car in front of him, the automobile of plaintiff turned across the center of the road in attempting to get around some other automobiles which were also going south, and thus ran into defendant's automobile causing the injury.

This conflicting evidence made a case for the jury under proper instructions as to the law on the respective issues of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff.

Appellant complains of instructions given to the jury at the request of plaintiff, and particularly of instruction No. 3, which informed the jury as to the law of speed applicable to the case as expressed in the words of the statute, and concluding directed "if you believe from a preponderance of the evidence in this case that the defendant drove his car in violation of the law herein set forth and caused the damage and injury to the plaintiff, if you so believe from the evidence the plaintiff was damaged or injured, then you should find the defendant guilty."

It is argued that this instruction was erroneous for the reason that while it directed a verdict for the plaintiff, it wholly took away from the consideration of the jury the question of due care on plaintiff's part.

On the part of the plaintiff it is contended that there is no evidence in the record from which contributory negligence can be inferred for the reason that the plaintiff was not driving the automobile at the time of the accident, and it is urged the negligence of the minor son who was driving cannot be imputed to the plaintiff. In support of this view appellee cites the cases of Buckler v. City of Newman,

was to have passed the electric car in front of him, the automobile of plaintiff turned across the center of the road in attempting to go around some other automobiles which were ahead of him, and the car ran into the plaintiff's automobile causing the injury.

This conflicting evidence made a case for the jury under proper instructions as to the law on the respective issues of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff.

Appellant complains of instructions given to the jury at the request of plaintiff, and particularly of instruction No. 3, which informed the jury as to the law of speed applicable to the case as expressed in the words of the statute, and concluding directed "If, on the evidence from a preponderance of the evidence in this case, defendant drove his car in violation of the law herein set forth and caused the damage and injury to the plaintiff, if you so believe from the evidence the plaintiff is entitled to recover, then you should find the defendant guilty."

It is urged that this instruction was erroneous for one reason that while it stated a violation for the plaintiff, it wholly took away from the consideration of the jury the question of the same on plaintiff's part.

On the part of the plaintiff it is contended that there is no evidence in the record from which contributory negligence can be inferred for the reason that the plaintiff was not driving the car mobile at the time of the accident, and it is urged the negligence of the driver was imputable to the plaintiff. [illegible] of this view appellee cites the cases of Pickler v. City of Keokuk,

116 Ill. App. 546; Board of Com. of Boone Co. v. Mutchler, 137 Ind. 140; Johnson v. City of St. Joseph, 96 Mo. A. 663.

We have examined the cases cited by appellee and think they do not sustain the doctrine contended for. These cases seem to hold that the mere relation of parent and child does not of itself render the parent chargeable with the acts of a minor in the driving of a vehicle unless it further appears the minor was at the time under the control and direction of the parent. The opinions, however, expressly state that the question of whether or not the minor is under such control is a question of fact for the jury. Appellee urges us to so hold in this case as a matter of law. The cases cited do not sustain this doctrine.

The contention of appellant might have merit if contributory negligence was a matter of defense only. However, the rule in Illinois (contrary to that which exists in some states) is that due care or lack of contributory negligence is one of the essential things which plaintiff must prove in an action of this kind in order to recover. It, therefore, in the first instance, devolved upon the plaintiff to show by sufficient evidence that at the time he was injured he was in the exercise of due care. Cullen v. Higgins, 216 Ill. 78.

Moreover, plaintiff tried his case upon the theory as alleged in his declaration that the minor was plaintiff's agent and driving in his behalf and we think he cannot here now urge to the contrary.

The instruction is clearly erroneous. It has in many cases been held that it is reversible error to

116 Ill. App. 546; Board of Com. of Boone Co. v. Hutchinson, 137 Ind. 140; Johnson v. City of St. Joseph, 95 Mo. A. 665.

We have examined the cases cited by appellee and think they do not sustain the doctrine contended for. These cases seem to hold that the mere relation of parent and child does not of itself render the parent chargeable with the acts of a minor in the driving of a vehicle unless it further appears the minor was at the time under the control and direction of the parent. The opinions, however, expressly state that the question of whether or not the minor is under such control is a question of fact for the jury. Appellee urges us to so hold in this case as a matter of law. The cases cited do not sustain this doctrine.

The contention of appellant might have merit if contributory negligence was a matter of defense only. However, the rule in Illinois (contrary to that which exists in some states) is that due care or lack of contributory negligence is one of the essential things which plaintiff must prove in an action of this kind in order to recover. It, therefore, in the first instance, devolved upon the plaintiff to show by sufficient evidence that at the time he was injured he was in the exercise of due care. Cullen v. Higgins, 216 Ill. 76.

Moreover, plaintiff tried his case upon the theory as alleged in his declaration that the minor was plaintiff's agent and driving in his behalf and we think he cannot here now urge to the contrary.

The instruction is clearly erroneous. It has in many cases been held that it is reversible error to

omit from an instruction which directs a verdict, any essential element which is necessary for the plaintiff to prove in order to recover, and this error is not cured by other instructions correctly informing the jury of the point at issue. Krieger v. A. E. & C. R. R. Co., 242 Ill. 544; Illinois Terra Cotta Co. v. Hanley, 214 Ill. 243; I. C. R. R. Co. v. Smith, 208 Ill. 608; Pardridge v. Cutler, 163 Ill. 504.

Other points have been urged by appellant which we do not deem it necessary to discuss. For the error indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

omit from an instruction which directs a verdict, any essential element which is necessary for the plaintiff to prove in order to recover, and this error is not cured by other instructions correctly informing the jury of the point at issue. Krieger v. R. R. I. & P. Co., 242 Ill. 544; Illinois Terra Cotta Co. v. Hanley, 214 Ill. 445; I. M. & T. Co. v. Smith, 208 Ill. 608; Partridge v. Taylor, 182 Ill. 504.

Other points have been urged by counsel which we do not deem it necessary to discuss. For the error indicated the judgment must be reversed and the cause remanded.

Mr. Justice Adams delivered the opinion of the court.

227 - 23572

211 I.A. 453

ROBERT QUAIT, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
HORACE L. WORTHAM, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Quait, brought suit against the defendant upon a written contract and recovered judgment - pursuant to a directed verdict - in the sum of $1392. This appeal is from that judgment.

In May, 1902, Wortham Bros.' Co., which conducted a merchandising business at Tuscola, moved its business to Rockford, Illinois. The plaintiff, Robert Quait, was and had been a salesman for Carson, Pirie, Scott and Company, for over thirty years. In the interests of his employers he traveled throughout the state of Illinois. He had sold general merchandise for his employers to Wortham Bros.' Co. when that Company conducted its business in Tuscola, and, also, after it moved and established its business at Rockford. The Wortham Bros.' Co. moved from Tuscola to Rockford in May, 1902. On September 9, 1902, the plaintiff and the defendant, Horace L. Wortham, together with William L. Wortham and Jesse L. Wortham - who were made defendants but not served - entered into a written

227 - 25572

ROBERT QUAIT,

Appellee,

vs.

HORACE E. WORTHAM,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Quait, brought suit against the defendant upon a written contract and recovered judgment - pursuant to a directed verdict - in the sum of $1392. This appeal is from that judgment.

In May, 1922, Wortham Bros.' Co., which conducted a merchandising business at Tuscola, moved its business to Rockford, Illinois. The plaintiff, Robert Quait, was and had been a salesman for Carson, Pirie, Scott and Company, for over thirty years. In the interests of his employers he traveled throughout the state of Illinois. He had sold general merchandise for his employers to Wortham Bros.' Co. when that Company conducted its business in Tuscola, and, also, after it moved and established its business at Rockford. The Wortham Bros.' Co. moved from Tuscola to Rockford in May, 1922. On September 9, 1922, the plaintiff and the defendant, Horace E. Wortham, together with William E. Wortham and Jesse L. Wortham - who were made defendants but not served - entered into a written

agreement, the substantial part of which is as follows:

> "The said parties of the first part (meaning the Worthams) in consideration that said party of the second part (meaning Quait) purchase thirty (30) shares of the common stock of the Wortham Brothers Company, a corporation duly organized and existing under the laws of the State of Illinois, and having its place of business at Rockford, in Winnebago County, State of Illinois, and in which said company said parties of the first are stockholders, and pays the sum of three thousand dollars ($3,000) cash for same, hereby agree to pay said Quait the sum of two hundred forty ($240) dollars annually, payable on the ninth day of September of each year, during the time the same is held by Robert Quait and not otherwise.
>
> And it is hereby agreed by said Quait that he will hold said thirty (30) shares of stock for the period of five years from the date hereof, with the option and privilege to the parties of the first part to purchase said thirty (30) shares of stock from said Quait on their paying him therefor the sum of three thousand dollars ($3,000) at any time before the expiration of said five years.
>
> And it is agreed that the dividends earned by said stock during the time the same is held by said Quait shall be paid to said parties of the first part, and shall be collected by them from said corporation, and the said Quait hereby authorizes the said parties of the first part to collect the same, and to give receipts and acquittances therefor in his name:
>
> And it is further agreed that during the said period of five years the parties of the first part control the said stock for the purpose of voting the same in person or by proxy at any annual, special, or other meeting of the stockholders, convened for any purpose whatever; and the said Quait does hereby constitute and appoint said parties of the first part, or any or either of them, his attorney or attorneys, or agent, or agents, for him and in his name, place and stead to vote said stock at any such meetings."

Wortham Brothers Co. was capitalized at $100,000. Pursuant to the terms of the written agreement on September 9, 1902, a certificate for thirty shares - each of the par value of $100 - of that company's stock, was delivered to the plaintiff and the latter paid therefor the sum of $3,000.00. There is some question as to where the con-

tract in question was signed and by whom it was drawn; plaintiff testifying that it was presented to him by Jesse Wortham and signed by him on September 9, 1902, at the office of Carson, Pirie, Scott and Company, in Chicago, when Jesse L. Wortham was present; and the defendant, Horace L. Wortham, testifying that he, himself, signed the contract at Rockford and that the plaintiff, himself, was at Rockford on September 9, 1902. As to the actual drawing up of the contract; the plaintiff says it was presented to him by Jesse Wortham and was already signed by the Worthams; and Horace L. Wortham says it was prepared by the plaintiff's lawyer. The contract itself appears to be typewritten on a letterhead of the Worthams. The evidence shows that payments in the sum of $240 per year pursuant to the contract had been made to the plaintiff for the years 1903, 1904 and 1905. Claim is now here made for the annual instalments at the rate of $240 per year for the years 1906, 1907, 1908 and 1909, being the total principal sum of $960.00, together with interest, which, at the rate of five per cent per annum, make, in toto, $1392.00.

At the trial, counsel for the defendant undertook to introduce certain evidence in order to show that the written agreement was that the 8 per cent on the $3,000.00, or $240.00 a year, was to be paid only during the period of five years from September 9, 1902. Objection being made thereto and being sustained, counsel for the defendant made the following proffer:

trust in question was signed and by whom it was drawn; plaintiff testifying that it was presented to him by Jesse Worthem and signed by him on September 9, 1902, at the office of Carson, Fitzie, Scott and Company, in Chicago, when Jesse L. Worthem was present; and the defendant, Horace L. Worthem, testifying that he, himself, signed the contract at Rockford and that the plaintiff, himself, was at Rockford on September 9, 1902. As to the actual drawing up of the contract; the plaintiff says it was presented to him by Jesse Worthem and was already signed by the Worthems; and Horace L. Worthem says it was prepared by the plaintiff's lawyer. The contract itself appears to be typewritten on a letterhead of the Worthems. The evidence shows that payments in the sum of $240 per year pursuant to the contract had been made to the plaintiff for the years 1903, 1904 and 1905. Claim is now made for the annual instalments at the rate of $240 per year for the years 1906, 1907, 1908 and 1909, being the total principal sum of $960.00, together with interest, which, at the rate of five per cent per annum, make, in late, $1202.00.

At the trial, counsel for the defendant undertook to introduce certain evidence in order to show that the written agreement was that the 3 per cent on the $2,000.00, or $240.00 a year, was to be paid only during the period of five years from September 9, 1902. Objection being made thereto and being sustained, counsel for the defendant made the following proffer:

"On behalf of the defendant, Horace L. Wortham, counsel offers to prove by the witness now on the witness stand, Horace L. Wortham, that previous to September 9, 1902, the parties to this contract, Robert Quait, on the one hand, and the three Worthams on the other, came to an oral agreement to this effect:- That he, the said Quait, would purchase thirty shares of stock of the Wortham Brothers Company at par or for $3,000 and pay that sum therefor; that he would give them an option to re-purchase this stock at par for the period of five years; that in consideration of that option, they were to pay him 8 per cent. or $240 annually during the option period and no more; that during that option period they were to have power to vote the stock and were during that same period to receive all dividends, if any; further, that the said Quait prepared or caused the contract in evidence to be prepared; that after it was prepared, he presented it to the Worthams telling them that it incorporated the previous oral agreement which they had made with reference to the purchase of the stock; that they read it over and that they understood the contract, from his statement and from the reading of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they had the understanding from Quait's statement that the contract obligated them to pay $240 a year for a maximum of five years only."

The trial judge being of the opinion that the proffered evidence was incompetent, and no further evidence being offered, on motion of the counsel for the plaintiff, directed a verdict for the plaintiff in the sum of $1392, and entered judgment for that amount. The sole question in the case is whether the parol evidence was competent.

The contract provided, put succinctly, that in consideration of the purchase by the plaintiff of thirty shares for $3,000.00 - which purchase was made - that the defendants agreed to pay him $240.00 annually during the time he held the stock "and not otherwise"; that he would hold the stock at the defendants' option for five years, defend-

"On behalf of the defendant, Horace L. Worthman, counsel offers to prove by the witness now on the witness stand, Horace L. Worthman, that previous to September 9, 1902, the parties to this contract, Robert Quait, on the one hand, and the three Worthmans on the other, came to an oral agreement to this effect:- That he, the said Quait, would purchase thirty shares of stock of the Worthman Brothers Company at par or for $3,000 and pay that sum therefor; that he would give them an option to re-purchase this stock at par for the period of five years; that in consideration of that option, they were to pay him 8 per cent. or $240 annually during the option period and no more; that during that option period they were to have power to vote the stock and were during that same period to receive all dividends, if any; further, that the said Quait prepared or caused the contract in evidence to be prepared; that after it was prepared, he presented it to the Worthmans telling them that it incorporated the previous oral agreement which they had made with reference to the purchase of the stock; that they read it over and that they understood the contract, from his statement and from the reading of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they had the understanding from Quait's statement that the contract obligated them to pay $240 a year for a maximum of five years only."

The trial judge being of the opinion that the proffered evidence was incompetent, and no further evidence being offered, on motion of the counsel for the plaintiff, directed a verdict for the plaintiff in the sum of $1392, and entered judgment for that amount. The sole question in the case is whether the parol evidence was competent.

The contract provided, put succinctly, that in consideration of the purchase by the plaintiff of thirty shares for $3,000.00 - which purchase was made - that the defendants agreed to pay him $240.00 annually during the time he held the stock "and not otherwise"; that he would hold the stock at the defendants' option for five years, defend-

ants topay $3,000.00 if they purchased it; that the dividends earned by the stock during the time it should be held by him should be paid to them; and that during the period of five years they should have control of the stock for voting purposes. The option and the voting privilege of the defendants is for five years. The payment of $240.00 a year, and the payments of dividends to the defendants are to be during the time the stock is held by the plaintiff. Each of those provisions is consistent with all the others. As long as the defendants paid $240.00 a year, they were to receive the dividends. And, as long as they had the option, they had the voting privilege. There is no ambiguity. The meaning is quite obvious. That the contract may have been improvident does not necessarily render it of doubtful meaning. Did the trial court err in excluding the proffered parol evidence? The defendants offered to prove (1) that "previous" - the time is not otherwise stated - to September 9, 1902, the plaintiff and the defendant entered into an oral agreement that the plaintiff would purchase thirty shares for $3,000.00; that he would give them an option of purchase for five years; that in consideration of the option they would pay him eight per cent., or $240.00 annually during the option period only; that during that period they were to have the dividends and the voting power; (2) that the defendants prepared the contract; that he told them that it incorporated the previous oral agreement; that they read it over and they understood the contract, from his statement and from the reading

ants topay $3,000.00 if they purchased it; that the dividends earned by the stock during the time it should be held by him should be paid to them; and that during the period of five years they should have control of the stock for voting purposes. The option and the voting privilege of the defendants is for five years. The payment of $240.00 a year, and the payments of dividends to the defendants are to be during the time the stock is held by the plaintiff. Much of these provisions is consistent with all the others. As long as the defendants paid $240.00 a year, they were to receive the dividends. And, as long as they had the option, they had the voting privilege. There is no ambiguity. The meaning is quite obvious. That the contract may have been improvident does not necessarily render it of doubtful meaning. Did the trial court err in excluding the proffered parol evidence? The defendants offered to prove (1) that "previous" - the time is not otherwise stated - to September 3, 1922, the plaintiff and the defendant entered into an oral agreement that the plaintiff would purchase thirty shares for $3,000.00; that he would give them an option of purchase for five years; that in consideration of the option they would pay him eight per cent., or $240.00 annually during the option period only; that during that period they were to have the dividends and the voting power; (2) that the defendants prepared the contract; that he told them that it incorporated the previous oral agreement; that they read it over and they understood the contract. From his statement and from the reading

of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they understood from the plaintiff's statement that the contract bound them to pay $240.00 a year for "five years only". Is the oral agreement reasonably consistent with the meaning connoted by the written words? If not, then it was inadmissible. The written contract provides for the payment of $240.00 annually, "during the time" the stock "is held by Robert Quait and not otherwise." The oral agreement, according to the proffer, provides that the $240.00a a year is to be paid "during the option period and no more", "a maximum of five years only". The words, "during the time the stock is held by Robert Quait and not otherwise" do not connote the same idea as to time as the words "during the option period and no more". The option period of five years has pre-determined mathematical termini; whereas, "during the time the stock is held by Robert Quait" is expressly of uncertain termination. Inasmuch, therefore, as the proffered evidence would change a substantial provision of the written contract, a provision, clearly and explicitly expressed, it was properly excluded. Mr. Justice Farmer, in Chicago Auditorium Ass'n. v. Fine Arts Bldg., 244 Ill. 532, used the following language, "If the language is plain and unambiguous proof aliunde cannot be heard to contradict or vary its meaning or give it a meaning inconsistent with the language used in the instrument."

In the course of the evidence which was offered and excluded, it is recited that the defendant "read it

of it, to mean just what their oral agreement had been; that the contract was thereupon executed; that they understood from the plaintiff's statement that the contract bound them to pay $240.00 a year for "five years only". Is the oral agreement reasonably consistent with the meaning connoted by the written words? If not, then it was inadmissible. The written contract provides for the payment of $240.00 annually, "during the time" the stock "is held by Robert Quait and not otherwise." The oral agreement, according to the proffer, provides that the $240.00 a year is to be paid "during the option period and no more", "a maximum of five years only". The words, "during the time the stock is held by Robert Quait and not otherwise" do not connote the same idea as to time as the words "during the option period and no more". The option period of five years has pre-determined mathematical terminal; whereas, "during the time the stock is held by Robert Quait" is expressly of uncertain termination. Inasmuch, therefore, as the proffered evidence would change a substantial provision of the written contract, a provision, clearly and explicitly expressed, it was properly excluded. Mr. Justice Turner, in Chicago Auditorium Assn. v. Chas. Aris Mfg., 344 Ill. 520, used the following language, "If the language is plain and unambiguous proof aliunde cannot be heard to contradict or vary its meaning or give it a meaning inconsistent with the language used in the instrument."

In the course of the evidence which was offered and excluded, it is recited that the defendant "read it

over (meaning the written contract) and that he understood the contract, from his statement and from the reading of it, to mean just what their parol agreement had been." The position of counsel is somewhat to the effect that the defendant, who admittedly read the contract before he signed it, made a mistake as to its meaning and considered it to mean something which the plaintiff told him it meant. Such a mistake, if made, cannot here be rectified; although it may be the appropriate subject for a different kind of action in another forum. The parol evidence rule, which, in effect, is in the nature of a rule of substantive law, excludes, in such a case as this, both correction and rectification. The defense that he signed the contract of his own volition, but intended something else, is inadmissible. Hansen v. Gavin, 280 Ill. 354. Further, there is no evidence that the defendant was illiterate, or for any other reason incapable of understanding the written terms of the contract. It follows, therefore, that this particular case does not fall within any one of the exceptions to the general parol evidence rule.

There being no error in the record the judgment is affirmed.

AFFIRMED.

over (meaning the written contract) and that he understood the contract, from his statement and from the reading of it, to mean just what their parol agreement had been." The position of counsel is somewhat to the effect that the defendant, who admittedly read the contract before he signed it, made a mistake as to its meaning and considered it to mean something which the plaintiff told him it meant. Such a mistake, if made, cannot have be rectified; although it may be the appropriate subject for a different kind of action in another form. The parol evidence rule, which, in effect, is in the nature of a rule of substantive law, excludes, in such a case as this, both correction and rectification. The defense that he signed the contract of his own volition, but intended something else, is inadmissible. Kenney v. Gavin, 280 Ill. 354. Further, there is no evidence that the defendant was illiterate, or for any other reason incapable of understanding the written terms of the contract. It follows, therefore, that this particular case does not fall within any one of the exceptions to the general parol evidence rule.

There being no error in the record the judgment is affirmed.

AFFIRMED.

473 - 23818

GEORGE W. PLUMMER,

Appellee,

vs.

EDWARD J. ADER,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 461

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

In the trial court, without a jury, the plaintiff, George W. Plummer, having brought suit for certain legal services, recovered a judgment against the defendant in the sum of $200. From that judgment this appeal is taken.

In the latter part of 1911 an information for disbarment was filed against the defendant. According to the testimony of the plaintiff certain legal services were rendered by him in the course of the disbarment proceedings. His evidence is to the effect that he appeared before the Master in Chancery before whom testimony was taken, filed objections to the report of the Master, participated in the preparation of a brief for the Supreme Court and conferred with another attorney in preparation for an argument to be made by the latter in the Supreme Court. The plaintiff claims that his legal services in those proceedings were worth, altogether, from $800.00 to $1,000.00. The ad damnum in the statement of claim is $200.00. The witness, John L. Fogle, corroborates the plaintiff to the effect that the latter appeared before the Bar Association grievance committee at least twice; that the plaintiff represented the defendant after the information was filed;

475 - 22818

GEORGE W. PLUMMER, Appellee,	
vs.	
EDWARD L. ADAMS, Appellant.	

IN THE SUPREME COURT OF WISCONSIN.

Filed June 6, 1961.

MR. CHIEF JUSTICE TAYLOR delivered the opinion of the court.

In the trial court, without a jury, the plaintiff, George W. Plummer, having brought suit for certain legal services, recovered a judgment against the defendant in the sum of $500. From that judgment this appeal is taken.

In the latter part of 1958 an information for disbarment was filed against the defendant. According to the testimony of the plaintiff our his legal services were rendered by him in the course of the disbarment proceedings. His evidence in substance is to the effect that he appeared before the master in Monroe only before which a hearing was held. Filed objections to the report of the master, participated in the preparation of a brief for the Supreme Court and conferred with another attorney in preparation for an argument to be made by the latter in the Supreme Court. The plaintiff claims that the legal services in those proceedings were worth, altogether, from $[illegible] to $[illegible]. The ad damnum in the statement of claim is $[illegible]. The witness, John L. Boyle, corroborated the plaintiff's to the effect that the latter appeared before the disciplinary grievance committee at least twice; that the plaintiff represented the defendant after the information was filed;

that plaintiff was the active attorney in the matter until it was submitted on oral argument in the Supreme Court in June, 1913, that the plaintiff appeared before the Master more than ten times, and possibly thirty times; that a usual, reasonable and customary fee for the services rendered by the plaintiff would be $1000.00. On the other hand the defendant testified that the plaintiff stated that he would do the work before the Bar Association for nothing; that he never asked for any compensation on account of legal services in that matter; that he, the defendant, never retained the plaintiff to take part in the proceedings in the Supreme Court. He admits, however, that the plaintiff was present at the taking of testimony. There is evidence concerning other cases that the plaintiff took part in through employment by the defendant, and, also, of payments made by the defendant to the plaintiff. Other witnesses testified, and one Ehrlich, to the effect that the plaintiff, on one occasion intimated that if he could do anything for the defendant he would be glad to do it without compensation.

The determination of the facts depended upon the question of credibility; and, as there was ample evidence in support of the plaintiff's claim, we are not justified in overruling the judgment of the trial judge. Complaint is made on the ground that the claim was outlawed; but, as the evidence shows that the plaintiff worked for, or rendered services for the defendant continuously, at least for quite a period of years, and as part of the legal services in the disbarment proceedings

that plaintiff was the active attorney in the matter until it was submitted on oral argument in the Supreme Court in June, 1913, that the plaintiff appeared before the Master more than ten times, and possibly thirty times; that a usual, reasonable and customary fee for the services rendered by the plaintiff would be $1000.00. On the other hand the defendant testified that the plaintiff stated that he would do the work before the Bar Association for nothing; that he never asked for any compensation on account of legal services in that matter; that he, the defendant, never retained the plaintiff to take part in the proceedings in the Supreme Court. He admits, however, that the plaintiff was present at the taking of testimony. There is evidence concerning other cases that the plaintiff took part in through employment by the defendant, and, also, of payments made by the defendant to the plaintiff. Other witnesses testified, and one Kurlich, to the effect that the plaintiff, on one occasion intimated that if he could do anything for the defendant he would be glad to do it without compensation.

The determination of the issue depended upon the question of credibility; and, as there was ample evidence in support of the plaintiff's claim, we are not justified in overruling the judgment of the trial judge. Complaint is made on the ground that the claim was outlawed; but, as the evidence shows that the plaintiff worked for, or rendered services for the defendant continuously, at least for quite a period of years, and as part of the legal services in the disbarment proceedings

was rendered within the statutory period, that claim is unfounded. Complaint is also made that the trial court erred in not allowing a change of venue; but, obviously that is untenable. Of course, the final contention, that the plaintiff did not sue for as much as the evidence shows he was entitled to, that is from $800.00 to $1000.00, instead of $200.00, is without merit. Generosity is not an offense. He who sues for less than that to which he is entitled and foregoes the residue is to be commended, not condemned.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

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Finding no error in the record the judgment is affirmed.

AFFIRMED.

561 - 23906

211 I.A. 462

DR. WM. J. MOLDENHAUER,
Appellee,

vs.

JOSEPH MOSKALCZUK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Dr. Wm. J. Moldenhauer, brought suit against the defendant for the sum of $75, for medical services and recovered judgment in that amount. This appeal is taken therefrom.

The statement of facts shows that plaintiff, a physician and surgeon, was called, on August 8, 1913, to attend the defendant who had been injured; that in the course of the following three weeks, plaintiff called on the defendant at his home fifteen times; that within the same period of time the defendant called at the office of the plaintiff twelve times and that subsequently thereto the defendant called at the office of the plaintiff nineteen times, making, in all, a total of thirty-one office calls; that the plaintiff had been called in court to testify in a case in which the defendant was the plaintiff; that for all the services rendered by the plaintiff to the defendant he charged the sum of $75, as a fair, reasonable, usual and customary charge for the services

561 - 23906

DR. WM. J. MOLDENHAUER,
Appellee,

vs.

JOSEPH MOSKALCZUK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Dr. Wm. J. Moldenhauer, brought suit against the defendant for the sum of $75, for medical services and recovered judgment in that amount. This appeal is taken therefrom.

The statement of facts shows that plaintiff, a physician and surgeon, was called, on August 8, 1913, to attend the defendant who had been injured; that in the course of the following three weeks, plaintiff called on the defendant at his home fifteen times; that within the same period of time the defendant called at the office of the plaintiff twelve times and that subsequently thereto the defendant called at the office of the plaintiff nineteen times, making, in all, a total of thirty-one office calls; that the plaintiff had been called in court to testify in a case in which the defendant was the plaintiff; that for all the services rendered by the plaintiff to the defendant he charged the sum of $75, as a fair, reasonable, usual and customary charge for the services

performed. The statement of facts further shows that on cross examination plaintiff stated that he had been treating the defendant for bruises about the head, and, also, for headache; that he considered the number of calls that he made was necessary and that, generally, when he called on the defendant, or the defendant called at his office, he gave him some medicine; that for the first call he made at the defendant's house he charged him $5.00; that for subsequent calls at the house he charged the defendant at the rate of $1.50 a call, and for office calls 75 cents to $1.00; that for his appearance in court he charged the defendant $25.00. The statement of facts further shows that when the defendant asked the witness, "Is it not a fact that you charged 50 cents for each office call?", the question was objected to by counsel for the plaintiff and the objection sustained by the court, and an exception to the ruling thereon taken by the defendant.

The defendant introduced no evidence but made various motions at the close of the plaintiff's evidence, all of which motions were overruled. The trial judge then found the issues in favor of the plaintiff and assessed the plaintiff's damages in the sum of $75.00 upon which judgment was duly entered.

It is now claimed by the appellant (1) that the statement of claim did not state a cause of action; (2) that the plaintiff, a physician, was not entitled to extra compensation as an expert testifying in the former suit in the absence of a special agreement.

performed. The statement of facts further shows that on cross examination plaintiff stated that he had been treating the defendant for bruises about the head, and, also, for headache; that he concerned the number of calls that he made was necessary and that, generally, when he called on the defendant, or the defendant called at his office, he gave him some medicine; that for the first call he made at the defendant's house he charged him $5.00; that for subsequent calls at the house he charged the defendant at the rate of $1.50 a call, and for office calls 75 cents to $1.00; that for his appearance in court he charged the defendant $25.00. The statement of facts further shows that when the defendant asked the witness, "Is it not a fact that you charged 50 cents for each office call?", the question was objected to by counsel for the plaintiff and the objection sustained by the court, and an exception to the ruling thereon taken by the defendant.

The defendant introduced no evidence but made various motions at the close of the plaintiff's evidence, all of which motions were overruled. The trial judge then found the issues in favor of the plaintiff and assessed the plaintiff's damages in the sum of $75.00 upon which judgment was duly entered.

It is now claimed by the appellant (1) that the statement of claim did not state a cause of action; (2) that the plaintiff, a physician, was not entitled to extra compensation as an expert testifying in the former suit in the absence of a special agreement.

(1) The statement of claim is as follows: "Plaintiff alleges his claim is for medical services rendered during the years 1913, 1914, 1915 and 1916, amounting to the sum of $75.00." The affidavit attached to the plaintiff's statement of claim recites "that the said cause is on a contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due the plaintiff from the defendant, after allowing for the defendant all his just credits, deductions and set-offs, the sum of $75.00." Section 40 of the Municipal Court Act merely requires "a statement of the plaintiff's claim, which statement, if the suit be upon a contract, express or implied, shall consist of a statement of the account or of the nature of the demand,"etc. We are of the opinion that, as the statement of claim recited that it was for medical services and recited that those services were rendered in certain specified years, and that the amount of the claim was $75.00, it was sufficient. And, although the evidence recited in the statement of facts in the record is apparently somewhat condensed and abbreviated, and does not give the questions and answers which occurred at the trial, a careful examination thereof leads us to the conclusion that it justified the judgment. (2) Part of the statement of facts is to the effect that the plaintiff had rendered certain services to the defendant in testifying in some case in which the defendant was the plaintiff, and for those services made a charge of $25.00. There is no evidence in the record of any cross examination on that subject, or of anything in rebuttal, and, under those circumstances, we are unable to say that the court erred in allowing plaintiff's claim for those services.

(1) The statement of claim is as follows:

"Plaintiff alleges his claim is for medical services rendered during the years 1915, 1916, 1918 and 1919, amounting to the sum of $75.00." The affidavit attached to the plaintiff's statement of claim recites "that the said cause is on a contract for the payment of money; that the nature of plaintiff's demand is as stated and that there is due the plaintiff from the defendant, after allowing for the defendant all his just credits, deductions and set-offs, the sum of $75.00." Section 60 of the Municipal Court Act merely requires "a statement of the plaintiff's claim, which statement, if the suit be upon a contract, express or implied, shall consist of a statement of the account or of the nature of the demand,"etc. We are of the opinion that, as the statement of claim recited that it was for medical services and recited that those services were rendered in certain specified years, and that the amount of the claim was $75.00, it was sufficient. And, although the evidence recited in the statement of facts in the record is apparently somewhat condensed and abbreviated, and does not give the questions and answers which occurred at the trial, a careful examination thereof leads us to the conclusion that it justified the judgment. (2) Part of the statement of facts is to the effect that the plaintiff had rendered certain services to the defendant in testifying in some case in which the defendant was the plaintiff, and for these services made a charge of $50.00. There is no evidence in the record of any cross examination on that subject, or of anything in rebuttal, and, under these circumstances, we are unable to say that the court erred in allowing plaintiff's claim for these services.

As to the claim of the defendant, that the court erred in sustaining an objection to the question, "Is it not a fact that you charged 50 cents for each office call?", the record of what transpired before the trial judge is too incomplete to justify its consideration.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

As to the claim of the defendant, that the court erred in sustaining an objection to the question, "Is it not a fact that you charged $5 extra for each office call?", the record of what transpired before the trial judge is too incomplete to justify its consideration.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

402 - 23747

J. ELLIOTT AINSLIE,
Appellee,

vs.

JOSEPH H. BIGGS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

211 I.A. 463

MR. JUSTICE O'CONNOR delivered the opinion of the court.

J. Elliot Ainslie brought suit against Joseph H. Biggs to recover for personal injuries. There was a verdict and judgment in favor of plaintiff for $1,200 to reverse which defendant prosecutes this appeal.

The record discloses that about six o'clock in the evening of February 4, 1915, plaintiff was walking east along the north sidewalk of Leland avenue, between Kenmore avenue and Sheridan Road, Chicago. Between these two streets there is an alley about sixteen feet wide, which extends north and south and opens upon Leland avenue. The evening in question was rainy, cold and dark. As plaintiff came opposite the opening of the alley, a one and half ton auto-truck was coming out of the alley. Plaintiff tried to step back to avoid being injured, slipped and fell, and the right front wheel of the truck passed over his leg, fracturing the fibula about midway between the knee and ankle. The truck was brought to a stop before the hind wheel passed over plaintiff's leg.

GCC - 23747

J. ELLICOTT AINSLIE, Appellee,	
vs.	CIRCUIT COURT,
JOSEPH H. BIGGS, Appellant.	NOX COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

J. Elliot Ainslie brought suit against Joseph H. Biggs to recover for personal injuries. There was a verdict and judgment in favor of plaintiff for $1,500 to reverse which defendant prosecutes this appeal.

The record discloses that about six o'clock in the evening of February 4, 1915, plaintiff was walking east along the north sidewalk of Elgin avenue, between Lemoyne avenue and Sheridan road, Chicago. Between these two streets there is an alley about sixteen feet wide, which extends north and south and opens upon Leland avenue. The evening in question was rainy, cold and dark. As plaintiff came opposite the opening of the alley, a one and half ton auto-truck was coming out of the alley. Plaintiff tried to step back to avoid being injured, slipped and fell, and the right front wheel of the truck passed over his leg, fracturing the fibula about midway between the knee and ankle. The truck was brought to a stop before the hind wheel passed over plaintiff's leg.

The defendant first contends that there is a fatal variance between the allegations of the declaration and the evidence, in that it was averred in the declaration that "said auto truck then and there ran and struck with great force and violence upon and against the plaintiff and thereby the plaintiff was then and there thrown with great force and violence to and upon the ground", while the proof showed that the plaintiff was not thrown to the ground, but on the contrary that he in an endeavor toget out of the way slipped and fell and the wheel passed over his leg.

In support of this contention the cases of Chicago Union Traction Co. v. Hampe, 228 Ill. 346, and Christensen v. Oscar Daniels Co., 142 Ill. App. 129, are cited. In the Hampe case the averment of the declaration was that the "car struck with great force and violence against the wagon, whereby plaintiff was thrown with great force and violence upon the ground," while the evidence showed that there was about to be a collision between the street car on which plaintiff was a passenger and a wagon some distance ahead on the track, and when the car was at least thirty or thirty-five feet from the wagon, plaintiff stepped off or was pushed from the car, and it was held that this variance was fatal. In the Christensen case it was held that the allegation that plaintiff "tripped upon the said cable and threw his hand back against the said drum," was not sustained by proof that he "was tripped by the lower drum, that is the one behind me," etc., and that this constituted a fatal variance.

The defendant first contends that there is a fatal variance between the allegations of the declaration and the evidence, in that it was averred in the declaration that "said auto truck then and there ran and struck with great force and violence upon and against the plaintiff and thereby the plaintiff was then and there thrown with great force and violence to and upon the ground", while the proof showed that the plaintiff was not thrown to the ground, but on the contrary that he in an endeavor to get out of the way slipped and fell and the wheel passed over his leg.

In support of this contention the cases of Chicago Union Traction Co. v. Hoppe, 228 Ill. 246, and Christensen v. Chicago Daily Co., 149 Ill. App. 129, are cited. In the Hoppe case the averment of the declaration was that the "car struck with great force and violence against the wagon, whereby plaintiff was thrown with great force and violence upon the ground," while the evidence showed that there was about to be a collision between the street car on which plaintiff was a passenger and a wagon some distance ahead on the track, and when the car was at least thirty or thirty-five feet from the wagon, plaintiff stepped off or was pushed from the car, and it was held that this variance was fatal. In the Christensen case it was held that the allegation that plaintiff "tripped upon the said cable and threw his hand back against the said drum," was not sustained by proof that he "was tripped by the lower arm, that is the one behind me," etc., and that this constituted a fatal variance.

We think the variance in these two cases was greater than in the case at bar, and are of the opinion that here the variance is not of substantial character. Moreover, we think the point was not properly saved. When plaintiff's evidence was being introduced that tended to show the variance complained of, no objection was made, but at the close of plaintiff's case counsel for defendant stated he wanted to make a motion, "on the ground that they have not proved what is alleged in their declaration. They say the automobile truck knocked him down to the ground whereas the witnesses don't testify to that. There is a variance between the proof and the declaration. I make a motion to dismiss because they have not proved what they have alleged." Defendant thereupon submitted a written motion together with an instruction that the jury return a verdict of not guilty. From this it appears that it was not pointed out at any time in what respect the proof failed to meet the allegations. In L. S. & M. S. Ry. Co. v. Ward, 135 Ill. 511, the court said (516): "At the close of the evidence the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant on the ground that there was no negligence on the part of the defendant; that the accident occurred through the negligence of the plaintiff, 'and that the proof varies from the declaration.' This was the only attempt to point out a variance, and it was clearly insufficient. It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court topass upon the question intelligently and also to enable the plaintiff to so amend her pleading

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as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim." To the same effect are Murchie v. Peck Bros. & Co., 160 Ill. 175; Probst Construction Co. v. Foley, 166 Ill. 31, and City of Chicago v. Weiland, 139 Ill. App. 197. In the latter case it was said an objection on the ground of variance must be specifically pointed out on the trial at the time the variance is made apparent by the proofs and the court's attention directed to it; that the object of this was to prevent a mistrial on a legal technicality in no wise affecting plaintiff's case, and that the plaintiff might be afforded an opportunity of avoiding the variance by appropriate amendment to his declaration. It was there said: "The trend of the law is to discourage technicalities which tend to defeat natural justice and right, and to encourage the adjudication of causes on their merits."

In the instant case, we think the objection on the ground of variance was not sufficiently specific. Furthermore, at the close of all the evidence, the defendant again moved for an instructed verdict, but at that time made no point that there was a variance. Where a motion is made for an instructed verdict at the close of plaintiff's case and is overruled, if the defendant fails to renew the motion at the close of all the evidence, the ruling of the court cannot be urged as error on appeal. J.A.& N. Ry. Co. v. Velie, 140 Ill. 59; Wolf Co. v. Refrigerating Co., 252 Ill. 491. At the close of all the evidence the defendant moved for a directed verdict, but as he failed

as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim." To the same effect are Murphie v. Peck Bros. & Co., 180 Ill. 175; Probst Construction Co. v. Foley, 158 Ill. 31, and City of Chicago v. Williams, 159 Ill. App. 197. In the latter case it was said an objection on the ground of variance must be specifically pointed out on the trial at the time the variance is made apparent by the proofs and the court's attention directed to it; that the object of this was to prevent a mistrial on a legal technicality in no wise affecting plaintiff's case, and that the plaintiff might be afforded an opportunity of avoiding the variance by appropriate amendment to his declaration. It was there said: "The trend of the law is to discourage technicalities which tend to defeat natural justice and right, and to encourage the adjudication of causes on their merits."

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to mention that the motion was made on the ground of a variance, the point is not before us.

Complaint is made of instruction 3 given on behalf of the plaintiff, which told the jury, among other things, that they might take into consideration the rate of speed the truck was being driven, at and prior to the time of the injury. It is said that there is no allegation that plaintiff was injured in consequence of the rate of speed at which the truck was travelling. It is true that there is no specific charge that the truck was being operated at a dangerous rate of speed. The charge is a general charge of negligence in the operation of the truck. We think it was sufficient to warrant the giving of the instruction, as the evidence tended to show that there were no lights on the truck and no warning was given as it came out of the alley, and while the evidence did not show that it was being driven at a reckless rate of speed, we think under the circumstances the question of speed was one of the elements properly submitted to the jury.

Complaint is made of instructions 6 and 10. Instruction 6 is said to be wrong in that it told the jury they might use their observation and experience in business affairs in estimating the damages, and did not confine the jury to the evidence in the case; and instruction 10 is said to be erroneous in that the jury were told that in estimating plaintiff's damages they might take into consideration mental suffering, resulting from

to mention that the motion was made on the ground of a variance, the point is not before us.

Complaint is made of instruction 3 given on behalf of the plaintiff, which told the jury, among other things, that they might take into consideration the rate of speed the truck was being driven, at and prior to the time of the injury. It is said that there is no allegation that plaintiff was injured in consequence of the rate of speed at which the truck was travelling. It is true that there is no specific charge that the truck was being operated at a dangerous rate of speed. The charge is a general charge of negligence in the operation of the truck. We think it was sufficient to warrant the giving of the instruction, as the evidence tended to show that there were no lights on the truck and no warning was given as it came out of the alley, and while the evidence did not show that it was being driven at a reckless rate of speed, we think under the circumstances the question of speed was one of the elements properly submitted to the jury.

Complaint is made of instructions 8 and 10. Instruction 8 is said to be wrong in that it told the jury they might use their observation and experience in business affairs in estimating the damages, and did not confine the jury to the evidence in the case; and instruction 10 is said to be erroneous in that the jury were told that in estimating plaintiff's damages they might take into consideration mental suffering, resulting from

the injury, while the declaration contained no averment in this regard; that it authorized the jury to take into consideration future pain and suffering in estimating the damages, when there was no evidence to warrant this, and permitted the jury tospeculate on the question of damages, as it did not confine them to the necessary, direct and proximate consequences of the injury.

We think the objection to instruction 6 is not well taken, for it told the jury in applying their experience and observation in the business affairs of life that this should be considered in connection with the evidence in the case.

There is no express allegation in the declaration as to mental suffering, but we do not think instruction 10 was misleading. There was evidence that tended to show that the injury was permanent and that plaintiff would suffer in the future. We are therefore of the opinion that the other objections urged to this instruction cannot be sustained.

Moreover, no complaint is made that the verdict is excessive, and even if these instructions on the question of damages were not accurate, yet the objections made to them, even if sustained, could only affect the amount of the verdict, and as no complaint is made in this regard, it is apparent that the defendant was in no way injured.

It is urged that instruction 7 is erroneous, for the reason that the word "accident" mentioned in it was not defined, and therefore it was misleading. We will

the injury, while the declaration contained no averment in this regard; that it authorized the jury to take into consideration future pain and suffering in estimating the damages, when there was no evidence to warrant this, and permitted the jury to speculate on the question of damages, as it did not confine them to the necessary, direct and proximate consequences of the injury.

We think the objection to instruction 3 is not well taken, for it told the jury in applying their experience and observation in the business affairs of life that this should be considered in connection with the evidence in the case.

There is no express allegation in the declaration as to mental suffering, but we do not think instruction 10 was misleading. There was evidence that tended to show that the injury was permanent and that plaintiff would suffer in the future. We are therefore of the opinion that the other objections urged to this instruction cannot be sustained.

Moreover, no complaint is made that the verdict is excessive, and even if these instructions on the question of damages were not accurate, yet the objections made to them, even if sustained, could only affect the amount of the verdict, and no complaint is made in this regard, it is apparent that the defendant was in no way injured.

It is urged that instruction 7 is erroneous, for the reason that the word "accident" mentioned in it was not defined, and therefore it was misleading. We will

presume that the jurors were well informed and understood the English language as required by section 2, chapter 78, R. S., and we therefore have no doubt that the instruction in this regard was perfectly clear. We have considered the other objections urged to this instruction, but think they are without substantial merit.

Upon a consideration of all the instructions we are of the opinion that, considering the fact that the case was simple and easily understood, there was no substantial error in any of the points complained of.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

presume that the jurors were well informed and understood the English language as required by section 2, chapter 78, R. S., and we therefore have no doubt that the instruction in this regard was perfectly clear. We have considered the other objections urged to this instruction, but think they are without substantial merit.

Upon a consideration of all the instructions we are of the opinion that, considering the fact that the case was simple and easily understood, there was no substantial error in any of the points complained of.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

476 - 23821

P. R. McLEOD, doing business as McLEOD & COMPANY,

Appellant,

vs.

ALEXANDER J. ALEXANDER and LUCAS BROADHEAD, Trustees of the Estate of ALEXANDER J. ALEXANDER, and ASHLAND BLOCK ASSOCIATION, a corporation,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 485

MR. JUSTICE O'CONNOR delivered the opinion of the court.

P. R. McLeod, doing business as McLeod & Company, brought suit against the defendants to recover $600 claimed to be due plaintiff for the purchase price of four valves. The case was tried before the court without a jury; there was a finding and judgment in favor of the defendants, to reverse which plaintiff prosecutes this appeal.

The evidence tends to show that plaintiff called on a representative of the defendants for the purpose of selling balance piston valves to be used in the operation of the pumps in the Ashland block; that he represented that if these valves were installed in lieu of the ones then in use, there would be developed from ten to thirty per cent more power, or if no more power was needed, there would be a saving of from ten to thirty per cent in fuel; that after some negotiations it was agreed that plaintiff should install the valves on one of the pumps, and if they

475 - 2882I

P. H. McLEOD, doing business as McLEOD & COMPANY, Appellant,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ALEXANDER J. ALEXANDER and ALBERT RODERMUND, Trustees of the Estate of ALEXANDER J. ALEXANDER, and ASHLAND BLOCK ASSOCIATION, a corporation, Appellees.	

Mr. JUSTICE CLEMENTS delivered the opinion of the court.

P. H. McLeod, doing business as McLeod & Company, brought suit against the defendants to recover $800 claimed to be due plaintiff for the purchase price of four valves. The case was tried before the court without a jury; there was a finding and judgment in favor of the defendants, to reverse which plaintiff prosecutes this appeal.

The evidence tends to show that plaintiff claims on a representative of the defendants for the purpose of selling balance piston valves to be used in the operation of the pumps in the Ashland Block; that he represented that if these valves were installed in lieu of the ones then in use, there would be developed from ten to twenty per cent more power, or if no more power was needed, there would be a saving of from ten to twenty per cent in fuel; that after some negotiations it was agreed that plaintiff should install the valves on one of the pumps, and if they

made the saving as represented, defendants would buy them for $600; that at the time of the agreement plaintiff submitted a printed form of contract which defendant refused to sign, stating that if the valves worked as represented no written agreement was necessary. Plaintiff installed valves on one of the pumps where they remained for approximately one year.

Plaintiff contends that the agreement was that the valves were to be tested by defendants within a reasonable time after installation, that defendants failed to make the test, and under these circumstances plaintiff was entitled to recover the purchase price of the valves, they having been in the possession of defendants for more than a reasonable time in which to make the test. He further contends that he was entitled to recover on an account stated; that after the installation of the valves, and approximately for the twelve months following, he sent statements of the account to defendants each month, and no objection was made thereto until about a year afterwards, when payment was refused and the valves disconnected.

Defendants contend that the agreement was that plaintiff should install the valves on his own responsibility, and if they made the saving of fuel as warranted, and when this was shown, then the question of purchasing them would be taken up; that under these circumstances there could be no account stated. Defendants further contend that in June, 1916, they made a test of the valves for about ten days, and that there was no saving in the consumption of fuel as warranted.

made the saving as represented, defendants would buy them for $600; that at the time of the agreement plaintiff submitted a printed form of contract which defendant refused to sign, stating that if the valves worked as represented no written agreement was necessary. Plaintiff installed valves on one of the pumps where they remained for approximately one year.

Plaintiff contends that the agreement was that the valves were to be tested by defendants within a reasonable time after installation, that defendants failed to make the test, and under these circumstances plaintiff was entitled to recover the purchase price of the valves, they having been in the possession of defendants for more than a reasonable time in which to make the test. He further contends that he was entitled to recover on an account stated; that after the installation of the valves, and approximately for the twelve months following, he sent statements of the account to defendants each month, and no objection was made thereto until about a year afterwards, when payment was refused and the valves disconnected.

Defendants contend that the agreement was that plaintiff should install the valves on his own responsibility, and if they made the saving as that as warranted, and when this was shown, then the question of purchasing them would be taken up; that under these circumstances there could be no account stated. Defendants further contend that in June, 1916, they made a test of the valves for about ten days, and that there was no saving in the consumption of fuel as warranted.

Of course if the valves were not purchased by the defendants the mere fact of sending statements each month would not make an account stated. Plaintiff offered evidence that tended to show that other valves installed by him in somewhat similar circumstances made the saving in the consumption of fuel as warranted. The court evidently accepted defendants' theory, and as the evidence was conflicting, we cannot say upon a careful examination of the record that the finding of the court is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Of course if the valves were not purchased by the defendants the mere fact of sending statements each month would not make an account stated. Plaintiff offered evidence that tended to show that other valves installed by him in somewhat similar circumstances made the saving in the consumption of fuel as warranted. The court evidently accepted defendants' theory, and as the evidence was conflicting, we cannot say upon a careful examination of the record that the finding of the court is manifestly against the weight of the evidence.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

156 - 23499

211 I.A. 486

ALBERT PICK & COMPANY and SILAS J. WHITLOCK, trustee in bankruptcy of the Estate of NATALBY'S etc., Appellants,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
vs.	
CHARLES D. NATALBY et al, Appellees.	

MR. JUSTICE THOMSON delivered the opinion of the court.

The original bill in this case was filed by Albert Pick & Company, a corporation, July 19, 1915, in which the complainant alleged that it had recovered a judgment for $765.00 and costs on Feb. 18, 1915, against Albert D. Natalby and Charles D. Natalby, copartners, as Natalby Brothers; that an execution was issued thereon and returned by the sheriff in no part satisfied; that the defendants for some years prior to the judgment, had conducted a restaurant and saloon, and that in the conduct of the business various persons had become indebted to them; that they had certain real and personal property which could not be reached at law, but which ought to be applied to the payment of the said judgment; that the defendants organized a corporation, the certificate of incorporation being recorded in Cook County June 20, 1914; that they subscribed for practically all of the stock and to pay for the same, had conveyed the personal property which had con-

186 - 23499

ALBERT PICK & COMPANY
and SILAS T. WHITLOCK,
trustee in bankruptcy of
the Estate of NATALBY'S etc.,

Appellants,

vs.

CHARLES D. NATALBY et al,

Appellees.

APPEAL FROM
SUPREME COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The original bill in this case was filed by Albert Pick & Company, a corporation, July 19, 1913, in which the complainant alleged that it had recovered a judgment for $7?8.00 and costs on Feb. 13, 1913, against Albert D. Natalby and Charles D. Natalby, copartners, as Natalby Brothers; that an execution was issued thereon and returned by the sheriff in no part satisfied; that the defendants for some years prior to the judgment, had conducted a restaurant and saloon, and that in the conduct of the business various persons had become indebted to them; that they had certain real and personal property which could not be reached at law, but which ought to be applied to the payment of the said judgment; that the defendants organized a corporation, the certificate of incorporation being recorded in Cook County June 20, 1914; that they subscribed for practically all of the stock and to pay for the same, had conveyed the personal property which had con-

stituted the assets of the co-partnership, to the corporation; that this transfer was merely colorable and for the purpose of placing the property of the two Natalbys out of their possession so as to hinder and delay creditors; and that the transfer was void in that the parties had failed to comply with the provisions of the Bulk Sales Law of Illinois. The bill prays for full discovery as to all charges made therein, that the transfer of assets from the partnership to the corporation complained of, may be declared void, and that the assets which may be discovered, may be subjected to the payment of the complainant's judgment, and that the defendants may be enjoined from selling, transferring, or encumbering any of their property, and that a receiver may be appointed. About a year later, on July 12, 1916, a motion was made by Silas J. Whitlock as trustee in bankruptcy of the estate of Charles D. Natalby and Albert D. Natalby individually and as co-partners, and also as trustee for Natalby's a corporation, for leave to intervene as a party complainant, and to file an amended and supplemental bill, and the court entered the order allowing the motion; and on the same day, Silas J. Whitlock, as trustee, filed his amended and supplemental bill which recited the fact of the filing of the original bill and the substance of it and proceeded to allege that upon the filing of that bill, the defendants therein named were served with process and appeared and answered and that the cause was thereafter referred to a Master in Chancery who, after hearing, submitted a report to the effect that the conveyance complained of, was fraudulent, and that a receiver of the property should

stituted the assets of the co-partnership, to the corporation; that this transfer was merely colorable and for the purpose of placing the property of the two Metzlys out of their possession so as to hinder and delay creditors; and that the transfer was void in that the parties had failed to comply with the provisions of the Bulk Sales Law of Illinois. The bill prays for full discovery as to all charges made therein, that the transfer of assets from the partnership to the corporation complained of, may be declared void, and that the assets which may be discovered, may be subjected to the payment of the complainant's judgment, and that the defendants may be enjoined from selling, transferring, or encumbering any of their property, and that a receiver may be appointed. About a year later, on July 12, 1916, a motion was made by Silas J. Whitlock as trustee in bankruptcy of the estate of Charles D. Metzly and Albert D. Metzly individually and as co-partners, and also as trustee for Metzly's a corporation, for leave to intervene as a party complainant, and to file an amended and supplemental bill, and the court entered the order allowing the motion; and on the same day, Silas J. Whitlock, as trustee, filed his amended and supplemental bill which recited the fact of the filing of the original bill and the substance of it and proceeded to allege that upon the filing of that bill, the defendants therein named were served with process and appeared and answered and that the cause was thereafter referred to a Master in Chancery who, after hearing, submitted a report to the effect that the conveyance complained of, was fraudulent, and that a receiver of the property should

be appointed, which report was approved and a receiver was duly appointed as prayed for.

This trustee's bill alleged further that on August 6, 1915, an involuntary petition in bankruptcy was filed against the two Natalbys individually and as co-partners, and that they were duly adjudged bankrupts on March 23, 1916, and that the complainant Whitlock was duly elected and appointed trustee for the said bankrupts, May 22, 1916, following which, an order was entered authorizing and directing him as such trustee to file the necessary suit or suits, to have certain notes and mortgages executed by each of the bankrupts to the Miller Brewing Company declared void.

The trustee further alleged in his supplemental bill that the two Natalbys conducted their business as co-partners up to June 30, 1914, at which time they purported to have conveyed their restaurant and saloon to Natalbys, a corporation, and that in and about the conduct of their business as co-partners they contracted an indebtedness aggregating $88,000.

He alleges further that on January 14, 1913, the two Natalbys entered into an agreement with the Fred Miller Brewing Co. in and by which they agreed to use no beer other than that manufactured by the Miller Brewing Co. provided the Brewing Company would at their request, loan them $25,000 to be evidenced by their notes to be secured by a first lien on premises therein described, and that pursuant to that agree-

be appointed, which report was approved and a receiver was duly appointed as prayed for.

This trustee's bill alleged further that on August 6, 1913, an involuntary petition in bankruptcy was filed against the two Matalyas individually and as co-partners, and that they were duly adjudged bankrupts on March 23, 1916, and that the complainant Whitlock was duly elected and appointed trustee for the said bankrupts, May 22, 1916, following which, an order was entered authorizing and directing him as such trustee to file the necessary suit or suits, to have certain notes and mortgages executed by each of the bankrupts to the Miller Brewing Company declared void.

The trustee further alleged in his supplemental bill that the two Matalyas conducted their business as co-partners up to June 30, 1914, at which time they purported to have conveyed their restaurant and saloon to Matalya, a corporation, and that in and about the conduct of their business as co-partners they contracted an indebtedness aggregating $88,000.

He alleges further that on January 14, 1913, the two Matalya entered into an agreement with the Fred Miller Brewing Co. in and by which they agreed to use no beer other than that manufactured by the Miller Brewing Co. provided the Brewing Company would at their request, loan them $25,000 to be evidenced by their notes to be secured by a first lien on premises therein described, and that pursuant to that agree-

ment, the Natalbys did thereafter request the Brewing Company to loan them $25,000 on July 25, 1913 on which date, Albert D. Natalby and wife executed their promissory notes aggregating the sum of $12,500 to secure which they executed their trust deed conveying to William Volbert, trustee and Silas H. Strawn, successor in trust, certain real estate which we shall designate as lot 19, and that a year later, on July 25, 1914, and pursuant to the same agreement, the same parties executed further notes aggregating the sum of $2,000, to secure which they executed another trust deed to the same parties as trustee and successor in trust conveying the same lot 19.

The bill further alleges the execution of notes and mortgages by Charles D. Natalby and wife executed on the same dates for the same amounts, to secure which they executed trustedeeds to the same parties, conveying the adjoining property, lot 20.

The trustee further alleges in his bill that on August 2, 1912, Charles D. Natalby and wife executed their notes in the sum of $2,500 payable $125.00 on the second day of each and every month for eleven months with a final payment of $1,125 due 12 months after date, interest at 6 per cent per annum, tosecure which they executed their trust deed to Leah Liebman, conveying lot 20, and that Abraham J. Liebman is the owner and holder of those notes.

This bill further alleges that on the same date, Albert D. Natalby and wife executed their promissory

ment, the Metalbya did thereafter request the Brewing Company to loan them $25,000 on July 25, 1912 on which date, Albert D. Metalby and wife executed their promissory notes aggregating the sum of $12,500 to secure which they executed their trust deed conveying to William Volbert, trustee and Silas K. Strawn, successor in trust, certain real estate which we shall designate as lot 19, and that a year later, on July 25, 1914, and pursuant to the same agreement, the same parties executed further notes aggregating the sum of $2,000, to secure which they executed another trust deed to the same parties as trustee and successor in trust conveying the same lot 19.

The bill further alleges the execution of notes and mortgages by Charles D. Metalby and wife executed on the same dates for the same amounts, to secure which they executed trustedeeds to the same parties, conveying the adjoining property, lot 20.

The trustee further alleges in his bill that on August 2, 1912, Charles D. Metalby and wife executed their notes in the sum of $2,500 payable $125.00 on the second day of each and every month for eleven months with a final payment of $1,125 due 12 months after date, interest at 6 per cent per annum, towards which they executed their trust deed to Leah Liebman, conveying lot 20, and that Abraham V. Liebman is the owner and holder of these notes.

This bill further alleges that on the same date, Albert D. Metalby and wife executed their promissory

notes for the same amounts and in the same terms as to payment and interest, to secure which they executed their trust deed to the same trustee conveying lot 19, and that this indebtedness was afterwards canceled and released of record and the trustee charges the fact to be that these transactions between the Liebmans and the two Natalbys are usurious and that both of the loans were made as part of the same transaction and that if an accounting were taken and had, it would show that usurious interest had been paid to Liebman by the Natalbys, and that pursuant to law and in accordance with equity and good conscience, the amount that should be paid to Liebman is much less than the amount of the instruments and has been, in fact, fully paid.

The trustee further alleges in his bill that on November 2, 1915, the Brewing Company filed a bill in the Circuit Court of Cook County seeking to foreclose the mortgagesexecuted by Charles D. Natalby and wife covering lot 20; that the interest of the Brewing Company in this lot by reason of the notes and trust deed executed by Charles D. Natalby and wife is inferior to the claim of the complainant trustee, and that by reason of the fact that these loans are ultra vires and that the Brewing Company is not authorized to do business in the State of Illinois where this transaction was made, the notes and trust deeds are void, and that the Brewing Company should be restrained from further proceeding with their foreclosure suit.

The trustee further alleges that the money described in the notes held by the Miller Brewing Company

notes for the same amounts and in the same terms as to payment and interest, to secure which they executed their trust deed to the same trustee conveying lot 19, and that this indebtedness was afterwards cancelled and released of record and the trustee charges the fact to be that these transactions between the Liebmann and the two Metalbys are usurious and that both of the loans were made as part of the same transaction and that if an accounting were taken and had, it would show that usurious interest had been paid to Liebmann by the Metalbys, and that pursuant to law and in accordance with equity and good conscience, the amount that should be paid to Liebmann is much less than the amount of the instruments and has been, in fact, fully paid.

The trustee further alleges in his bill that on November 2, 1915, the Drewing Company filed a bill in the Circuit Court of Cook County seeking to foreclose the mortgage executed by Charles D. Metalby and wife covering lot 20; that the interest of the Drewing Company in this lot by reason of the notes and trust deed executed by Charles D. Metalby and wife is inferior to the claim of the complainant trustee, and that by reason of the fact that these loans are usury vitae and that the Drewing Company is not authorized to do business in the State of Illinois where this transaction was made, the notes and trust deeds are void, and that the Drewing Company should be restrained from further proceeding with their foreclosure suit.

The trustee further alleges that the money described in the notes held by the Miller Drewing Company

was never received by the Natalbys or used by them in their restaurant and saloon business but was used to pay off a then existing indebtedness on the two pieces of real estate, lots 19 and 20, which indebtedness was owned by the Joseph Schlitz Brewing Company which held a lien on these two lots by reason of a similar contract to the one later entered into between Natalbys and the Miller Brewing Company.

The bill then alleges that the Miller Brewing Company is a Wisconsin corporation and quotes that part of its charter defining the business which it is thereby authorized to conduct, and alleges that the loans made tothe Natalbys represented by their notes given to the Brewing Company were not made pursuant to its corporate powers, and were contrary tothe laws of Illinois where the contract and notes in question were executed and that said contract is ultra vires and the notes and trust deeds are null and void.

The bill next recites the provisions of the laws of Illinois requiring the filing of certain statements by corporations organized elsewhere upon which they may be authorized totransact business in Illinois, and that after the Miller Brewing Company had filed such a statement and had been authorized to dobusiness in Illinois, it failed to comply with the Illinois laws requiring the filing of certain annual reports, and that in February, 1909 the Secretary of State canceled the permission of said corporation to transact business in Illinois, since which time the corporation

was never received by the Metalbye or used by them in their restaurant and saloon business but was used to pay off a then existing indebtedness on the two pieces of real estate, lots 19 and 20, which indebtedness was owned by the Joseph Schlitz Brewing Company which held a lien on these two lots by reason of a similar contract to the one later entered into between Metalbye and the Miller Brewing Company.

The bill then alleges that the Miller Brewing Company is a Wisconsin corporation and quotes that part of its charter defining the business which it is thereby authorized to conduct, and alleges that the loans made to the Metalbye represented by their notes given to the Brewing Company were not made pursuant to its corporate powers, and were contrary to the laws of Illinois where the contract and notes in question were executed and that said contract is <u>ultra vires</u> and the notes and trust deeds are null and void.

The bill next recites the provisions of the laws of Illinois requiring the filing of certain statements by corporations organized elsewhere upon which they may be authorized to transact business in Illinois, and that after the Miller Brewing Company had filed such a statement and had been authorized to do business in Illinois, it failed to comply with the Illinois laws requiring the filing of certain annual reports, and that in February, 1909 the Secretary of State cancelled the permission of said corporation to transact business in Illinois, since which time the corporation

has been transacting business in Illinois without any legal authority.

The trustee next alleges that on March 18, 1915, Albert D. Natalby and wife conveyed lot 19 to Anton G. Wille by warranty deed for an alleged consideration of $1,000.00 subject to encumbrances of record; that at the time of this sale, the property was valued by the parties at $18,500.00 which was a fair, reasonable market value of the property at that time; that all of the creditors with claims aggregating some $88,000.00 were creditors of Albert D. Natalby at the time this transfer was made; and that the liens of record referred to, being fraudulent and void, are not liens in fact upon that lot, by reason of which Wille has secured the title for the alleged consideration of $1,000.00 to the loss of the creditors of Albert D. Natalby to the extent of $17,500.00; and that it is inequitable and unjust that Wille should receive the property for such alleged consideration to the loss and detriment of the creditors of Albert D. Natalby.

The bill prays that an accounting be had and that it be decreed that the Miller Brewing Company is operating in the State of Illinois without authority, and that the loan made by the Brewing Company was ultra vires and null and void, and that the notes and trust deeds executed by Albert D. Natalby and wife be delivered into court and canceled and released of record, and that it be determined that the conveyance to Wille was in fact fraudulent as to the creditors of Albert D. Natalby

has been transacting business in Illinois without any legal authority.

The trustee next alleges that on March 18, 1918, Albert D. Metzlby and wife conveyed lot 19 to Anton G. Wille by warranty deed for an alleged consideration of $1,000.00 subject to encumbrances of record; that at the time of this sale, the property was valued by the parties at $18,000.00 which was a fair, reasonable market value of the property at that time; that all of the creditors with claims aggregating some $88,000.00 were creditors of Albert D. Metzlby at the time this transfer was made; and that the liens of record referred to, being fraudulent and void, are not liens in fact upon that lot, by reason of which Wille has secured the title for the alleged consideration of $1,000.00 to the loss of the creditors of Albert D. Metzlby to the extent of $17,500.00; and that it is inequitable and unjust that Wille should receive the property for such alleged consideration to the loss and detriment of the creditors of Albert D. Metzlby.

The bill prays that an accounting be had and that it be decreed that the Miller Brewing Company is operating in the State of Illinois without authority, and that the loan made by the Brewing Company was <u>ultra vires</u> and null and void, and that the notes and trust deeds executed by Albert D. Metzlby and wife be delivered into court and cancelled and released of record, and that it be determined that the conveyance to Wille was in fact fraudulent as to the creditors of Albert D. Metzlby

and that Wille be ordered and directed to convey said property upon payment to him of the sum he actually paid for it, together with any sum he may be found equitably entitled to, or in the alternative, if the court finds that Wille made such purchase in good faith, that he be allowed to retain it upon paying its value, and that he be confirmed in his title as to any right of any claims of the creditors of Albert D. Natalby upon his paying this complainant the ascertained value of the premises. The bill further prays that all loans made by the Miller Brewing Company and the notes and mortgages given therefor on lot 20 be declared null and void and that lot be decreed to belong to complainant as trustee free from any lien of the said notes or deeds, and that the latter be ordered released of record, that an accounting be had as to the transactions between the Liebmans and the Natalbys, and if on such accounting, it shall appear that usurious interest has been paid to the Liebmans that proper orders be entered determining such amount and canceling such indebtedness and declaring the notes and trust deeds toLiebman to be no lien or encumbrance upon the property, and that the same be canceled and released of record; that a receiver be appointed to take possession of the property in question and that an injunction issue restraining the Brewing Company from further proceeding with its foreclosure suit in the Circuit Court, and that Wille be restrained from doing anything to becloud the title of lot 19, and that the complainant may have such other and further relief as equity may require.

and that Willie be ordered and directed to convey said property upon payment to him of the sum he actually paid for it, together with any sum he may be found equitably entitled to, or in the alternative, if the court finds that Willie made such purchase in good faith, that he be allowed to retain it upon paying its value, and that he be confirmed in his title as to any right of any claims of the creditors of Albert B. Metzlby upon his paying this complainant the ascertained value of the premises. The bill further prays that all loans made by the Miller Brewing Company and the notes and mortgages given therefor on lot 20 be declared null and void and that lot be decreed to belong to complainant as trustee free from any lien of the said notes or deeds, and that the latter be ordered released of record, that an accounting be had as to the transactions between the Liebmann and the Metzlbys, and if on such accounting, it shall appear that usurious interest has been paid to the Liebmanns that proper orders be entered determining such amount and cancelling such indebtedness and declaring the notes and trust deeds Liebmann to be no lien or encumbrance upon the property, and that the same be cancelled and released of record; that a receiver be appointed to take possession of the property in question and that an injunction issue restraining the Brewing Company from further proceeding with its foreclosure suit in the Circuit Court, and that Willie be restrained from doing anything to beloud the title of lot 19, and that the complainant may have such other and further relief as equity may require.

This supplemental bill named the original complainant, Pick & Company, as a party defendant together with Wille, the Miller Brewing Company, the Liebmans and others.

The defendant Wille filed a special demurrer to the Whitlock supplemental bill, the Brewing Company, a general and special demurrer, and the Liebmans, a general demurrer.

The following year, on July 31, 1917, pursuant to an order of court, the original complainant, Pick & Company, filed an amended and supplemental bill containing practically the same allegations as those which had been made in the supplemental bill which had been filed by Whitlock, naming as parties defendant, Whitlock, the trustee, and all the defendants named in the supplemental bill which Whitlock had filed, except itself, Pick & Company. On the same day, the court entered an order providing that the several demurrers to the Whitlock supplemental bill were to stand as demurrers to the amended and supplemental bill of Pick & Company.

Thereupon the trial court entered a further order sustaining all three of the demurrers to both supplemental bills. The complainants elected to stand by their respective bills, whereupon the court entered its decree dismissing both supplemental bills for want of equity, from which decree the complainants, Whitlock, trustee in bankruptcy and Pick & Company, have appealed.

The supplemental bill amend the original complaint, like a tumbler, into a party defendant together with Hills, the Hills brewing company, the Hillsmans and others.

The Hillsmans filed a counterclaim demurrer to the Anheuser supplemental bill, the Tuesday company, a general and controlling demurrer, and the Hillsmans, a general demurrer.

The following year, on July 21, 1917, pursuant to an order of court, the original complaint, plus a demurrer, filed an amended and supplemental bill' containing practically the same allegations as those of the bill from which the supplemental bill had been filed by Anheuser, making the Hillsmans, Hillsmans, the trustees, and all [illegible] parties to the supplemental bill [illegible] Hillsmans Tuesday, Inc., a company. [illegible] the same day, [illegible] a motion preventing that the original demurrer to the original supplemental bill [illegible] be [illegible] sustained and [illegible] bill [illegible].

[illegible] order [illegible] supplemental bill [illegible] by [illegible] of equity, [illegible] trustee in bankruptcy [illegible] Company, [illegible].

We will first consider the demurrers so far as they apply to the supplemental bill filed by Whitlock, the trustee.

The demurrer of Wille to that bill was properly sustained on both of the two special grounds alleged in the demurrer. This bill did not offer to do equity as to Wille. It prayed that he might be decreed to convey the property back upon payment to him of whatever sum he had actually paid for it together with any sum he might be found to be equitably entitled to, but the complainant did not offer to pay Wille the sum which might be so found to be equitably due him.

The rights of Whitlock, the trustee in bankruptcy, as a party complainant against the defendants named in his bill, are such, and only such, as he derives by and through the provisions of the Bankruptcy Law. That act provides that all conveyances of the bankrupt within four months prior to the filing of the petition,made with the intention and purpose on his part to hinder or defraud his creditors shall be null and void as against the creditors except as to purchasers in good faith and for a fair consideration, and that all of such conveyances made by the bankrupt within four months prior to the filing of the petition and while he is insolvent, which are null and void as against the creditors by the laws of the State, shall be deemed null and void as against his creditors under the bankruptcy act and further that the trustee may avoid the transfer by the bankrupt of his property which any creditor of the bankrupt might

We will first consider the amendments so far as they apply to the supplemental bill filed by plaintiff, the trustee.

The question of title to that bill was properly mentioned on behalf of the two general grounds alleged in the demurrer. This bill did not offer to do equity as to title. It prayed that he might be decreed to convey the property back upon payment to him of whatever sum he had actually paid for it thereof or that any sum he might be found to be equitably entitled to, but the complainant did not offer to pay unto the sum which might be found to be equitably due him.

The rights of creditors, the trustee in bankruptcy, as a party complainant, against the defendants named in his bill, are only those which, he can derive by and through the provisions of the bankruptcy law. That act provides that all conveyances of the bankrupt made in fraud of his creditors prior to the filing of the petition, made with the intention and purpose on the part of the bankrupt to defraud his creditors shall be null and void as against the creditors except as to purchasers in good faith and for a fair consideration, and that all such conveyances made by the bankrupt within four months prior to the filing of the petition shall be in fraud of the laws of the state, shall be deemed null and void as against his creditors under the bankruptcy act and that it shall be the trustee may avoid the transfer by the bankrupt of his property which any creditor of the bankrupt might

have avoided and may recover the property so transferred or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of adjudication and it also provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. (Sections 67e, 70e, 47a)

It appears from the face of the supplemental bill filed by Whitlock, that lot 19 was conveyed to Wille by Albert D. Natalby, the bankrupt, more than four months before the filing of the bankruptcy petition. The bill contains no allegations that the conveyance was made with the intention and purpose on the part of Natalby to hinder and defraud his creditors or that he was insolvent at the time of the conveyance or that Wille was not a bona fide purchaser for a fair consideration. It appears from the allegations in the bill that Wille purchased the equity in lot 19 in good faith subject to certain encumbrances. If it develops, as the complainant alleges, that these encumbrances are void, that fact does not give the trustee of the bankrupt estate of the grantor, the right to avoid the conveyance under the facts alleged in this bill. If the trustee has any rights as against Wille under the terms of the Bankruptcy Act, they are the rights of "a judgment creditor holding an execution duly returned unsatisfied," attaching as of the date the title of the trustee attaches. Under the facts alleged in the bill no such creditor had any rights as against Wille. There are no facts alleged, showing or tending to show, that the conveyance to him, regardless

have avoided and may recover the property so transferred or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of adjudication and it also provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. (Section 67e, 70e, 47a)

It appears from the face of the supplemental bill filed by Whitlock, that Lot 18 was conveyed to Ella by Albert D. Bailey, the bankrupt, more than four months before the filing of the bankruptcy petition. The bill contains no allegations that the conveyance was made with the intention and purpose on the part of Bailey to give creditors his creditors or that he was insolvent at the time of the conveyance or that Ella was not a bona fide purchaser for a fair consideration. It appears from the allegations in the bill that Ella purchased the equity in Lot 18 in [illegible] subject to certain encumbrances. If it develops, [illegible] that these encumbrances are [illegible], that that does not give the trustee of the bankrupt estate of the mortgor, the right to avoid the conveyance [illegible] allowed in this bill. If the trustee has rights that are superior While under the terms of the bankruptcy act, they are the rights of "a judgment creditor holding an execution duly returned unsatisfied," attaching as of the date the title of the trustee attaches. Under the facts alleged in the bill no such creditor had any rights as against title. There are no facts alleged, showing or tending to show, that the conveyance to Ella, regardless

of the time it was made, was a fraud on creditors.

Considering next the demurrer of the Miller Brewing Company to the bill filed by Whitlock, the trustee, it will be seen that the bill discloses no rights in the complainant as against these defendants so far as lot 19 is concerned for the same reasons that it discloses no rights in him as against the defendant Wille. So far as lot 20 is concerned, the bill discloses that long before the complainant was appointed trustee of the estate of the bankrupts, this defendant had filed a bill in the Circuit Court of Cook County to foreclose the trust deeds conveying lot 20, given to secure the payment of the notes held by the Brewing Company. There is much discussion in the briefs filed by both parties as to whether the action of the Brewing Company in making these loans was ultra vires and whether that company was authorized to transact business in Illinois at the time the loans were made and consequently, whether the trust deeds and notes in question were void and whether such questions can be raised collaterally in such a case as the one at bar and also as to just when the rights of the trustee in bankruptcy obtained, whether as of the date of the filing of the bankruptcy petition or of the adjudication, all of which questions seem to us entirely immaterial. The trustee acquired no right to file a bill until he was appointed and at that time there was, and for some time previous thereto, there had been, pending in the Circuit Court, a bill filed by this defendant toforeclose these same loans, and whatever the rights of the

of the time it was made, was a fraud on creditors.

Considering next the demurrer of the Miller Brewing Company to the bill filed by Whitlock, the trustee, it will be seen that the bill discloses no rights in the complainant as against these defendants so far as lot 19 is concerned for the same reasons that it discloses no rights in him as against the defendant Willie. So far as lot 20 is concerned, the bill discloses that long before the complainant was appointed trustee of the estate of the bankrupts, this defendant had filed a bill in the Circuit Court of Cook County to foreclose the trust deeds conveying lot 20, given to secure the payment of the notes held by the Brewing Company. There is much discussion in the briefs filed by both parties as to whether the action of the Brewing Company in making these loans was *ultra vires* and whether that company was authorized to transact business in Illinois at the time the loans were made and consequently, whether the trust deeds and notes in question were void and whether such questions can be raised collaterally in such a case as the one at bar and also as to just when the rights of the trustee in bankruptcy obtained, whether as of the date of the filing of the bankruptcy petition or of the adjudication, all of which questions seem to us entirely immaterial. The trustee acquired no right to file a bill until he was appointed and at that time there was, and for some time previous thereto, there had been, pending in the Circuit Court, a bill filed by this defendant foreclose these same loans, and whatever the rights of the

trustee were as to lot 20 or as to the notes and trust deeds held by this defendant, he could not assert them by filing a bill, whether original or supplemental, in a court whose jurisdiction is concurrent with that of the Circuit Court, where the foreclosure action was pending, seeking a decree restraining the further prosecution of the foreclosure suit and declaring the notes and trust deeds involved in that suit void and directing that they be canceled. But it was both his right and his duty as such trustee, upon finding that a foreclosure suit was already pending in the Circuit Court involving these very notes and trust deeds, to which suit his bankrupts, the makers of the notes and grantors of the trust deeds, were parties defendant, to intervene in that suit and not come into such an action as the one at bar.

As to the demurrer filed by Liebman, it is our opinion that it also was properly sustained to the supplemental bill filed by Whitlock, the trustee. The allegations of the bill involving the Liebman loans are very confusing and indefinite. The bill recites that these loans are usurious and that the amount now due on the notes secured by trust deed conveying lot 20 is much less than the face of the notes and it is also alleged that these notes were executed as a part of the same transaction involving the notes secured by trust deed

trustee were as to lot 20 or as to the notes and trust deeds held by this defendant, he could not answer them by filing a bill, another original or supplemental, in a court whose jurisdiction is concurrent with that of the Circuit Court, where the foreclosure action was pending, seeking a decree terminating the further prosecution of the foreclosure suit and declaring the notes and trust deeds involved in that suit void and directing that they be cancelled. But it was both his right and his duty as such trustee, upon finding that a foreclosure suit was already pending in the Circuit Court involving these very notes and trust deeds, in which suit his bankruptcy, the status of the notes and premises of the trust deeds, were positive defendants, to interpose in that suit and not [illegible] the one at bar.

As to the counter claim by Hickman, it [illegible] opinion that it also was improperly interposed as the supplemental bill filed by Hickman, the trustee. The allegations of the bill are [illegible] long and very confusing and indefinite. The bill contains such trivial issues are matters and that the amount now due on the notes secured by trust deed covering lot 20 is much less than the face of the notes and it is also alleged that these notes were executed as a part of the same transaction involving the notes secured by trust deed

conveying lot 19, which latter had been canceled and released of record and that therefore the former notes have in fact been paid in full. The bill prays that an accounting may be had between the Liebmans and the Natalbys, and that if it appears that usurious interest has been paid, the amount shall be determined and the notes canceled and the trust deeds declared no lien or encumbrance on the property. The bill does not offer to do equity as to Liebman in case it is found that any sum is equitably due him on his notes. From the allegations contained in the bill, it appears that the Liebman loans are entirely regular and not usurious. All allegations in the bill to the contrary are conclusions merely and the bill for that reason was properly held bad on this demurrer.

We will now consider these several demurrers so far as they apply to the supplemental bill filed by the original complainant, Pick & Company.

The demurrer of Wille was properly sustained to that bill also. It appears from the face of the bill that the complainant recovered its judgment against Wille's grantor in February, 1915, and that the conveyance to Wille was made a month later. It appears further from the face

conveying lot 19, which latter has been cancelled and released of record and that therefore the former notes have in fact been paid in full. The bill prays that an accounting may be had between the litigants and the Master, and that if it appears that usurious interest has been paid, the amount shall be determined and the notes cancelled and the trust deeds declared no lien or encumbrance on the property. The bill does not offer to do equity as to Liebman in case it is found that any sum is equitably due him on his notes. From the allegations contained in the bill, it appears that the Liebman loans are entirely regular and not usurious. All allegations in the bill to the contrary are conclusions merely and the bill for that reason was properly held bad on this demurrer.

We will now consider these several demurrers so far as they apply to the supplemental bill filed by the original complainant, Pick & Company.

The demurrer of Hills was properly sustained to that bill also. It appears from the face of the bill that the complainant recovered its judgment against Hills's grantor in February, 1919, and that the conveyance to Hills was made a month later. It appears further from the face

of the bill that the title to the lot conveyed to Wille was registered under the Torrens Act, and that no certificate of the judgment recovered by Pick & Company was ever filed with the Registrar of Titles, (although an attempt to file it was made some time after the conveyance to Wille) and therefore that conveyance was in no way affected by the judgment as it never became a lien against the property under the provisions of the Torrens Act with regard to judgments. The appellant contends that these provisions of the Torrens Act to the effect that a judgment shall not be a lien upon registered land until a certificate or certified copy thereof is filed in the office of the Registrar and a memorial of the same is entered upon the register of the last certificate of the title to be affected, are unconstitutional in that they violate Section 29 of Article VI of the Constitution providing that the force and effect of judgments shall be uniform. It has been repeatedly held that this court has no authority to declare any act of the Legislature unconstitutional and void. If this case involved the constitutionality of the Torrens Act, or any part of it, the appeal should have been taken to the Supreme Court and not to this Court. But the case cannot be said to involve the validity of that Act within the meaning of the statute for it appears that its validity was not questioned in the trial court. C.C.C.& St.L. R. Co. v. McGrath, 195 Ill. 104; Opaque Cloth Shade Co.v. Veight, 161 Ill. 337. Appellants' contention that this provision of the Torrens Act as to judgments, is unconsti-

of the bill that the title to the lot conveyed to Hills was registered under the Torrens Act, and that no certificate of the judgment recovered by plaintiff's Company was ever filed with the Registrar of Titles. (Although an attempt to file it was made some time after the conveyance to Hills) and therefore that conveyance was in no way affected by the judgment as it never became a lien against the property under the provisions of the Torrens Act with regard to judgments. The appellant contends that these provisions of the Torrens Act to the effect that a judgment shall not be a lien upon registered land until a certificate or notification copy thereof is filed in the office of the registrar and a memorial of the same is entered upon the register of the land certificate of the title to be affected, are unconstitutional in that they violate Section 30 of Article VI of the Constitution providing that the form and effect of judgments shall be uniform. It has been repeatedly held that this court has no authority to declare any act of the Legislature unconstitutional and void. In this case involved the constitutionality of the Torrens Act, or any part of it. The appeal should have been taken to the Supreme Court and not to this court. For the same reason be said to involve the validity of that act within the meaning of the statute for at appeal. Nor the validity was not questioned in the trial court. Independent Ins. Co. v. McCrum, 195 Ill. 104; Chicago Sixth Ward Co-op. Union, 163 Ill. 327. Appellants' contention that this provision of the Torrens Act is so indefinite, in unconsti-

tutional appears for the first time in its reply brief.

The bill alleges no facts showing any equities whatever in Pick & Company as against Wille, either under section 49 of the Chancery Act, or any other law.

As to the demurrer of the Miller Brewing Company to the supplemental bill filed by Pick & Company, it will be seen (as in the case of the Whitlock bill) that the bill discloses no right in the complainant as against these defendants so far as lot 19 is concerned for the same reasons that it discloses no rights in it as against the defendant Wille. As to lot 19, the question of whether the Brewing Company's notes are valid and a good lien is wholly immaterial so far as Pick & Company are concerned for even if they were void, it avails them nothing for the title is out of the makers of those notes and is free and clear of any lien by reason of the judgment of Pick & Company.

As to lot 20, the supplemental bill of Pick & Company is also demurrable, so far as the Brewing Company is concerned. Pick & Company was a judgment creditor of the Natalbys with a good judgment lien against lot 20, subject, however, to such rights as the Brewing Company might have in that property, by virtue of their mortgage which was prior to the recovery of the Pick & Company judgment. It appears from the allegations contained in the bill filed by Pick & Company that a certified copy of the judgment they had recovered against the Natalbys was filed with the registrar of titles on April 14, 1916. It appears further that the east twenty feet of lot 20 is registered under the provisions of the Torrens Act,

instrument appears for the first time in its reply brief.

The bill alleges no facts showing any equities whatever in Fick & Company as against Willie, either under section 49 of the Chancery Act, or any other law.

As to the demurrer of the Miller Brewing Company to the supplemental bill filed by Fick & Company, it will be seen (as in the case of the Willicox bill) that the bill discloses no right in the complainant as against these defendants as far as lot 19 is concerned for the same reasons that it discloses no rights in it as against the defendant Willie. As to lot 19, the question of whether the Brewing Company's notes are valid and a good lien in validity immaterial so far as Fick & Company are concerned for even if they were void, it avails them nothing for the title is out of the makers of these notes and is free and clear of any lien by reason of the judgment of Fick & Company.

As to lot 20, the supplemental bill of Fick & Company is also demurrable, so far as the Brewing Company is concerned. Fick & Company was a judgment creditor of the Kentucky with a good judgment lien against lot 20, however, to such rights as the Brewing Company might have in that property, by virtue of their mortgage which was prior to the recovery of the Fick & Company judgment. It appears from the allegations contained in the bill filed by Fick & Company that a certified copy of the judgment they had recovered against the Kentucky was filed with the registrar of titles on April 14, 1919. It appears further that the east twenty feet of lot 20 is registered under the provisions of the Torrens Act.

and that the west thirty feet of that lot is not registered. The bill also alleges that the execution which was issued on the day following the recovery of the judgment in February, 1915 was duly returned, in no part satisfied in May of that year. The judgment, therefore, became a lien as against the west thirty feet of lot 20, six months before the Brewing Company filed their foreclosure suit. As a judgment creditor, with a valid lien against the property involved in the foreclosure suit, subject to such rights as the complainant in that foreclosure suit may have, by reason of its notes secured by the trust deeds sought to be foreclosed in that suit, Pick & Company could obtain full relief in that foreclosure suit itself. Horn v. The Volcano Water Co., et al, 13 Cal. 62; Ex Parte Mobly, 19 S. C. 337; Wightman v. Yaryan Co. 217 Ill. 371. In the latter case at page 377, our Supreme Court says that "parties having an interest in the subject-matter in equity who are either necessary or proper parties to such suit if not made so by the plaintiff may come in by way of application to intervene and be made parties complainant or defendant to the end that their interests may be adjudicated and protected." In Wehrheim v. Smith, 226 Ill. 346, at page 350, the Supreme Court speaking of a judgment creditor occupying a position analogous to that of Pick & Company here, says that such creditor was not only a proper party to the foreclosure proceeding, but was a necessary party if the mortgagee sought by those proceedings to affect in any way the rights and interests of the judgment creditor in the premises. A bill will not lie by Pick & Company in a court whose jurisdiction is concurrent with that in which the foreclosure suit is

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to that of Pick & Company here, says that such creditor was
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was a necessary party if the mortgagee sought by those
proceedings to effect in any way the rights and interests
of the judgment creditor in the premises. A bill will
not lie by Pick & Company in a court whose jurisdiction
is concurrent with that in which the foreclosure suit is

pending, seeking an injunction restraining that suit and the avoidance and cancelation of the notes and deeds there involved. A foreclosure suit will not be enjoined for the relief of one who might obtain full relief in that suit itself. 22 Cyc. 810; Waymire v. San Francisco etc. Ry. Co. 112 Cal. 646; Wilson v. Baker, 64 Cal. 475. The fact that the parties to the injunction proceeding are not the same as the parties to the proceeding sought to be enjoined, does not relieve the case from the operation of the rule, which is for the purpose of protecting the rights of courts rather than parties, to avoid conflict of jurisdiction and to prevent confusion and delay in the administration of justice. Crowley v. Davis, 37 Cal. 268.

High in his work on Injunctions at Sec. 52 says that it is a well established rule that "an injunction will not be granted to stay proceedings in the same court of equity, either upon the application of the parties to the proceedings sought to be enjoined, or of strangers to such proceedings, since a departure from the rule would lead to interminable litigation." That author says farther that in situations where the applicant for the restraining order can ordinarily avail himself of all his equities with full effect, in the proceedings sought to be enjoined, a court of equity will not enjoin such proceedings when no reason is shown why the party claiming to be aggrieved cannot protect himself by interposing his defense in the former suit. We deem these principles applicable to the situation in the case at bar. The bill does not allege that the

pending, seeking an injunction restraining that suit and the evidence and adjudication of the notes and deeds there involved. A foreclosure suit will not be enjoined for the relief of one who might obtain full relief in that suit itself. 32 Am. Dig. Injunctions 7. San Francisco etc. Ry. Co. 112 Cal. 668; Gibson v. Baker, 64 Tex. 172. The fact that a proceeding to the injunction proceeding - as not the same as the parties to the proceeding sought to be enjoined, does not relieve the case from the operation of the rule, which is for the purpose of protecting the rights of courts another than parties, to avoid conflict of jurisdiction and to prevent confusion and delay in the administration of justice. Crowley v. Lewis, 17 Tex. 466.

"Equity in this case to injunctions at law. It may be that it is well established rule that the injunction will not be granted to stay proceedings at law save upon a clear equity, either upon the ground of the merits of the controversy pending in a court of equity, or of exclusive jurisdiction in a court of equity. Some exceptions from the rule have been made in exceptional circumstances. Such cases rarely fall in which the equitable relief for restraining order can conveniently avail himself in all the equitable relief full extent, in the controversies sought to be enjoined, a court of equity will not enjoin from prosecution when no reason is shown why the party claiming to be aggrieved cannot protect himself by interposing his defense in the court at law. We deem these principles applicable to the claim made in the case at bar. The bill does not allege that the

complainant cannot get full relief in the foreclosure proceeding or that it could not secure such relief there as expeditiously as it could by a separate bill.

The Liebman demurrer was properly sustained to the supplemental bill filed by Pick & Company for the same reasons it was properly sustained to the supplemental bill filed by Whitlock, the trustee in bankruptcy.

It is urged generally by the appellees in support of the demurrers that both supplemental bills were subject to demurrer in that they were not germane to the original bill of Pick & Company and were not properly filed as amendments thereof or supplemental thereto. Where the parties are at issue upon the original bill and facts arise which show that it is necessary to pray for further relief or for additional discovery or if new charges are required to be made, it is proper to bring such additional matter into the case by supplemental bill. A supplemental bill may also be brought not only to insist upon the relief already prayed for in the original bill, but upon the other relief different from that which was prayed for in the original bill, where facts which have since occurred, may require it. (Story's Equity Pleading, Sections 335 - 336).

Centainly, as the appellees contend, the pleadings of the appellants involved here are very unusual and inartificial, as to the various parties

complainant cannot get full relief in the foreclosure proceeding or that it could not secure such relief there as expeditiously as it could by a separate bill.

The Chancery demurrer was properly sustained to the supplemental bill filed by Pick & Company for the same reasons it was properly sustained to the supplemental bill filed by Whitlock, the trustee in bankruptcy.

It is urged generally by the appellees in support of the demurrers that both supplemental bills were subject to demurrer in that they were not germane to the original bill of Pick & Company and were not properly filed as amendments thereof or supplemental thereto. Where the parties are at issue upon the original bill and facts arise which show that it is necessary to pray for further relief or for additional discovery or if new charges are required to be made, it is proper to bring such additional matter into the case by supplemental bill. A supplemental bill may also be brought not only to insist upon the relief already prayed for in the original bill, but upon the other relief different from that which was prayed for in the original bill, where facts which have since occurred, may require it. (Story's Equity Pleading, Sections 332 - 336).

Certainly, as the appellees contend, the pleadings of the appellants involved here are very unusual and inartificial, as to the various parties

involved, but we have not considered that question, inasmuch as our opinion is that all the demurrers were properly sustained to both supplemental bills, on other grounds.

For the reasons given, the decree of the trial court is affirmed.

AFFIRMED.

involved, but we have not considered some questions. Inasmuch as our answers to that all the documents were practically restatings to their supplemental bills, on other grounds.

For the reasons given, the decree of the trial court is AFFIRMED.

AFFIRMED.

231 - 23576

THE G. H. HAMMOND COMPANY,
a corporation,
Appellee,

vs.

GEORGE E. FORD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 490

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action of the first class in the Municipal Court of Chicago brought by The G. H. Hammond Company, hereinafter referred to as the plaintiff against George E. Ford, hereinafter referred to as the defendant. The action was based upon a contract wherein the plaintiff agreed to furnish cold storage facilities for an amount of apples equal to 5000 barrels for which the defendant agreed to pay the charges specified in the contract. By the terms of this contract, the plaintiff undertook to maintain in its warehouse, a temperature of thirty-one to thirty-two degrees Fahrenheit, except during such times, as apples would be taken in and out of storage, after which times, the plaintiff was allowed a reasonable time to secure the temperature called for. It was further provided in the contract that if the defendant did not store with the plaintiff, an amount of apples equal to 5000 barrels, he should pay to the plaintiff for the space reserved by it for him, a sum equal to fifty cents per barrel, for the season.

THE G. H. HANNOWN COMPANY,
a corporation,
Appellee,

vs.

GEORGE K. YORK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is an action of the first class in the Municipal Court of Chicago, brought by the G. H. Hannown Company, hereinafter referred to as the plaintiff, against George K. York, hereinafter referred to as the defendant. The action is based upon a written agreement in the plaintiff's agreed to furnish and install installation for an amount of $1.75 equal to 50% percent. For which the defendant agreed to pay the sum specified in the contract. By the terms of this contract, the plaintiff undertook to install in the residence, a temperature of sixty-one to sixty-five degrees Fahrenheit, except during mild weather, as heat could be turned out of storage, after which time, the plaintiff was allowed a reasonable time to secure the temperature called for. It was further provided in the contract that if the defendant did not agree with the plaintiff, an amount of heating equal to 50% percent, be added by the plaintiff for the space required by it for use, a sum equal to fifty cents per parcel, for the service.

The storage season involved in this case was that beginning in the fall of 1914 and extending to the following May. During this season, the defendant stored 3434 barrels of apples with the plaintiff under the contract. The plaintiff's claim consists of two items. By the first one, the plaintiff alleges that there is due it from the defendant, the sum of $1,285.83 for storage and cartage charges on the apples stored with it by the defendant. Under the second item, the plaintiff claims $783.00 as liquidated damages for the alleged failure of the defendant to store 1566 barrels of apples at the rate of fifty cents per barrel, that number being the difference between the 5000 barrels mentioned in the contract, and the 3434 barrels which the defendant placed in storage with the plaintiff under the contract. Following the filing of the statement of claim made by the plaintiff, the defendant filed an affidavit of merits in which, he denied owing the plaintiff anything, under the contract, and alleged that nothing was due from him to the plaintiff "by reason of the failure of the plaintiff to fulfill its part of the alleged contract with reference to temperature, and to exercise reasonable care and diligence in protecting said apples from deterioration." The defendant further denied owing the plaintiff the item of $783.00, alleging, among other things, that the plaintiff had waived any right it might have had to require the defendant to store the full amount of 5000 barrels called for by the contract. The defendant also filed a statement of claim for set-off, alleging that by reason of the failure of the plaintiff to maintain the temperature contracted for, the apples contained in certain specified lots, making up eight car-

The storage season involved in this case was that beginning in the fall of 1934 and extending to the following May. During this season, the defendant stored many barrels of apples with the plaintiff under the contract. The plaintiff's claim consists of two items. By the first one, the plaintiff alleges that there is due it from the defendant, the sum of $1,386.80 for storage and handling on the apples stored with it by the defendant. Under the second item, the plaintiff claims $750.00 as liquidated damages for the alleged failure of the defendant to store 1500 barrels of apples at the rate of fifty cents per barrel, that number being the difference between the 2500 barrels mentioned in the contract, and the 1000 barrels which the defendant placed in storage with the plaintiff under the contract. Following the filing of the statement of claim made by the plaintiff, the defendant filed an affidavit of merits in which, he denied owing the plaintiff anything, under the contract, and alleged that a verbal [illegible] from him to [illegible] by reason of the "[illegible] on the plaintiff's [illegible] part of the alleged contract [illegible] and no [illegible] [illegible] storing and [illegible] from [illegible]." [illegible] further denied owing the plaintiff the [illegible], [illegible] among other things, that [illegible] [illegible] it might have had to replace the [illegible] full crop of 1000 barrels of [illegible] for [illegible]. The defendant also filed a counterclaim of [illegible] for damages, alleging such by reason of the failure of the plaintiff to maintain the temperature [illegible], the apples continued to contain specklled [illegible], making the apples [illegible]

leads, which were in good condition when placed in storage with the plaintiff in the fall, deteriorated and it became necessary to repack them and withdraw them from storage and sell them for less than the defendant could and would have received for them at their fair market value if he had been able to withdraw them from storage in good condition, at the proper season. In his set-off, the defendant claimed damages in the sum of $1,325.25.

A trial was had before a jury, resulting in a verdict in favor of the plaintiff for the sum of $1,487.98. During the consideration of the defendant's motion for a new trial, the plaintiff filed a remittitur for $391.50 upon the court's suggestion, whereupon the motion for a new trial was overruled, and judgment was entered against the defendant for $1,096.48, from which, the defendant has appealed. The defendant has assigned errors affecting both items of the plaintiff's claim and the plaintiff has assigned cross errors as to matters affecting the defendant's claim for set-off.

At the close of the plaintiff's case, the defendant made two motions, the first asking the court to instruct the jury to find the issues for the defendant on the ground that the plaintiff had not made out a case, and the second asking the court to instruct the jury to find the issues for the defendant as to the item of $783.00. The court overruled the first motion, and took the second one under advisement. The defendant urges that the trial court erred in denying the first motion, but we are of the opinion that it was properly overruled. The plaintiff had made out a prima facie case as to its first item of claim, by putting

loads, which were in good condition when placed in storage with the plaintiff in the fall, deteriorated and it became necessary to remove them and withdraw them from storage and sell them for low prices. The defendant could and would have received for them at their fair market value if he had been able to withdraw them from storage in good condition. The proper measure. In his set-off, the defendant claimed damages in the sum of $4,382.25.

A trial was then held before a jury, resulting in a verdict in favor of the plaintiff for the sum of $1,487.98. During the consideration of the defendant's motion for a new trial, the plaintiff filed a remittitur for $250.00 upon the counterclaim, whereupon the motion for a new trial was overruled, and judgment was entered against the defendant for $1,240.98, from which the defendant has appealed. The defendant has assigned errors affecting both sides of the ledger, but the plaintiff and the plaintiff has assigned cross-error on a matter affecting the defendant's claim of error.

As to the claim of the plaintiff, first, the defendant moves to dismiss, the ground being that it is asking the court to instruct the jury to find the facts for the defendant on the claim of $250.00. The court overruled the first motion, and the jury returned a verdict in favor of the defendant. The defendant argues that the plaintiff waived the error in denying the first motion, but we do not think that it was properly overruled. The plaintiff has made out a prima facie case on its first item of claim, by putting the jury to find the facts for the defendant on the claim of $250.00.

the defendant on the stand under Section 33 of the Municipal Court Act, and through him, submitting to the jury, testimony, to the effect, that an itemized account of the storage and cartage charges, making up this item, which was shown the witness, had been checked up by his employees in June, 1915, and that it correctly stated the amount that the defendant's books showed was due the plaintiff after being so checked up. The issues raised by the affidavit of merits as to the alleged failure of the plaintiff to do the various things called for, on its part, under the terms of the contract, were matters of defense, but it was not incumbent upon the plaintiff to introduce any proof thereon in connection with presentation of its own case. Further, the defendant is not in a position to urge the denial of his motion as error, inasmuch as the record discloses that the motion was not renewed at the close of all the evidence.

After the defendant had rested his case, the trial court denied the motion which had been made at the close of the plaintiff's case to instruct the jury to find the issues for the defendant as the second item of the plaintiff's claim, and this ruling has also been assigned as error, and is properly before us, inasmuch as the evidence which followed it in rebuttal, had nothing to do with the issues involved in that item. This motion should have been allowed, as the evidence establishes a waiver on the part of the plaintiff to insist upon compliance with the terms of the contract, on the part of the defendant, to the full extent of the 5000 barrels mentioned in the contract. The evidence

the defendant on the stand under Section 33 of the Municipal Court Act, and through him, submitting to the jury, tentatively, to the effect, that an itemized account of the storage and cartage charges, making up this item, which was shown the witness, was then checked up by his employes in June, 1919, and that it correctly states the amount that the defendant's books showed was due the plaintiff [illegible] checked up. The issues raised by the affidavit of merits as to the alleged failure of the plaintiff to [illegible] the [illegible] called for, on its part, [illegible] of the contract, were matters of defense, [illegible] the burden upon the pleader [illegible] [illegible] in connection with presentation of its own case. Further, the defendant is not [illegible] to urge the denial of his motion as error, inasmuch as the record discloses that any motion was not renewed at the close of all the evidence.

After [illegible] the trial court [illegible] the plaintiff [illegible] the jury to find [illegible] the plaintiff's [illegible] [illegible] [illegible] ing [illegible] involved [illegible] motion [illegible] allowed, [illegible] [illegible] upon [illegible] compliance with the terms [illegible] on the part of the defendant, [illegible] 2000 barrels mentioned in the contract. The evidence

shows that in the early part of the storage season in the fall, the defendant talked with a Mr. Gadsen, representing the plaintiff, telling him that his shipments were running shorter than he had anticipated, and that he feared he would not be able to fulfill his contract for the entire amount of 5000 barrels, but that, if the plaintiff insisted upon his making the contract good, he would go out on the street and buy enough apples to fill the contract up, to which Mr. Gadsen replied, according to the defendant's testimony, "You do not need to do that. Just simply do the best you can with us," and according to Mr. Gadsen's testimony, "We are not technical, but do the best you can." This was clearly a waiver on the part of the plaintiff as to performance by the defendant to the full extent of 5000 barrels, provided Mr. Gadsen had proper authority to bind the plaintiff in that regard, which the plaintiff denies. The evidence shows, however, that Mr. Gadsen was the manager of the plaintiff's storage warehouses, and that he negotiated the dealings with the defendant that led to the consummation of the contract involved in this suit; and the evidence further shows that he had charge of the soliciting of storage business for the plaintiff and general charge of their storage plant, and that he had authority to make these storage contracts without submitting them to the plaintiff, and as he put it in his testimony "The Hammond Company are bound by whatever business I get." It seems clear, therefore, that his conversation with the defendant, to which we have referred, was a waiver of this provision of the contract, and that his authority to represent the plaintiff was broad enough to include such waiver.

[illegible] that in the early part of the evening [illegible] in the hall, the defendant talked with a Mr. Wilson, [illegible] concerning the plaintiff, telling him that [illegible] were trading stories that he had multiplied, and that he feared he would not be able to fulfill his contract for the rental [illegible] of both barrels, but that, if the plaintiff insisted upon his keeping the contract [illegible] he would go out on the floor and by [illegible] to fill the contract. Upon [illegible] according to the defendant's testimony, "I'm so [illegible] mad to do that, that [illegible] us." And according to Mr. Gardner's testimony, "he was not troubled, but he said [illegible]." [illegible] clearly a waiver on the part of the plaintiff [illegible] performance. The defendant [illegible] barrels, [illegible] the plaintiff in that regard, [illegible] the evidence shows, however, [illegible] accepted by the plaintiff [illegible] he negotiated the contract [illegible] to the consideration of [illegible] and the [illegible] solicitation of storage business for the plaintiff [illegible] general course of their storage plant, [illegible] authority to [illegible] waiting time to the plaintiff, [illegible] testimony "I'm [illegible] business [illegible]." In [illegible], [illegible] conversation with the plaintiff, [illegible] leased, was a waiver of [illegible] of the contract, and that the defendant [illegible] performance the plaintiff was [illegible] to employ such waiver.

The defendant further assigns certain errors having to do with his claim for set-off. Whether or not any of these are well taken, is immaterial, however, inasmuch as the defendant failed to make out a case on his set-off, and under the evidence, was not entitled to any allowance under it, and therefore, any errors that may have been committed in connection with the issues involved in the set-off, can not be said to have injured him. Under this claim for set-off, the defendant sought to show that certain lots of apples aggregating eight cars, had been partially spoiled in storage, by reason of improper care, and the failure of the plaintiff to maintain proper temperatures as called for in the contract. There was evidence tending to supply all of the elements involved in this claim for set-off, except as to the measure of damages. If the evidence supported the set-off, the defendant's measure of damages was the difference between the fair market value of the apples involved, if they had been withdrawn from storage in good condition at seasonable times, and the amount, the defendant was able to obtain for them in their damaged condition. The state of the evidence is such as to make it utterly impossible to arrive at any conclusion as to what the damages of the defendant were as to these apples involved in the claim for set-off. In the first place, the evidence does not show with any reasonable definiteness, what these eight cars of apples consisted of. The testimony showed that they consisted of Ganos, Ben Davis, Winesaps, and Willow-twigs. One witness says "they were mostly Ben Davis and Wine-sap with the Ben Davis predominating."

And another witness says "there were a few Willow-twigs, Ganos, and different varieties in between - Ben Davis and Wine-saps predominating." Another witness says "there were Ben Davis, Ganos, Willow-twigs, and some Wine-saps. There were more Ben Davis than any other variety." The evidence discloses nothing further as to how many barrels of these different kinds of apples were involved in this claim for set-off, and the only testimony in the record as to the fair market value of such apples in good condition, was the statement of one witness to the effect that, in the spring of 1915, the fair market value of Ben Davis apples ran from $3.50 to $4.00 a barrel. There were also in evidence thirty-three Daily Trade Bulletins for different days in April and May of 1915, containing the names of the apples referred to, and giving certain prices, but we have not been able to find any testimony in the record showing, or tending to show, that the prices as contained in these trade bulletins, correctly represent the fair market value of these various kinds of apples on the dates given in the bulletins. As pointed out by the plaintiff, it may well be that these sets of figures given in the bulletins are asking prices and bids, but in any event, the record is such as not to warrant any inference that they are statements of fair market values. As to this claim for set-off, the record is also silent as to what the defendant realized from the sale of the apples involved, in their alleged damaged condition. Apparently, the defendant endeavored to make out this element of proof on his set-off, by means of the market reports just referred to. The testimony was, that by reason of the deterioration of these

And another witness says "there were a few million-barrel
ones, and different variations in between - ten-barrel
and five-hole producing." Another witness says
"there were ten-barrel, twenty, 40,000-barrel, and some
five-hole. There were more than twelve in any other
variety." The witness Sandiman mentioned further on
to how many hundreds of these different sizes of engine
were involved in this case for one-year. We are only
concerned in the proceed as to the fair market value of
such engines in good condition. We have evidence of one
witness to the effect that, in a year's time or less, the
fair market value of one of the engines has fallen from $1,000
to $4,00 a barrel. There is no evidence [illegible]
there daily trade bulletins for [illegible] in April
and May of 1919. Considering the course of the [illegible]
referred to, the giving [illegible] not
been able to find any [illegible]
or reading to show. [illegible] in the
three buildings, correctly [illegible] the fair market value
of these various kinds of engines [illegible] the
buildings. In [illegible] it may well
be that there were [illegible] in the buildings
making, [illegible], but in any event, [illegible]
enough as not to [illegible]
mean of fair market value. [illegible]
oil, the [illegible] to [illegible]
realized from the sale of the [illegible]
alleged damaged condition. [illegible]
endeavored to make out that [illegible] on his
oil, by means of the market [illegible] to. The
testimony was, that by reason of the deterioration of these

apples due to improper temperatures and lack of the right sort of care, it became necessary to repack them and dispose of them as repacked goods. The trade bulletins in question, contain an item reading "repacked, discolored, or off in condition, different kinds" giving prices. Again the proof is deficient in failing to show that the prices appearing in these bulletins represent the fair market value of such apples, but even though that element was contained in the record, the defendant's case on his set-off would still be short of the proof necessary to enable him to recover anything under it, because there is no testimony anywhere in the record to the effect that the defendant received, upon the sale of the damaged apples, the fair market value of apples "repacked, discolored, or off in condition." The defendant's testimony was to the effect that it was impossible for him to tell just what he did get for these apples when they were sold, and in an effort to provide a proper basis for the estimate of his damages, he sought, by means of the trade bulletins in question, toshow what these kinds of apples were bringing at the times the apples involved in the set-off, were sold. But, as we have stated, the figures submitted are not shown to be the then fair market value of these apples, and in addition, they are not shown to have been sold for their then market value, and so far as the evidence in the record is concerned, the defendant may have sold them considerably above the figures appearing in the trade bulletins. Any allowance in favor of the defendant under the claim for set-off, was, therefore, entirely unwarranted by the evidence.

apples due to improper temperature and lack of the right sort of care, it became necessary to repack them and dispose of them as repacked goods. The trade bulletins in question, contain an item reading "repacked, damaged, or off in condition, different claims" giving prices. Again the proof is sufficient in failing to show that the prices appearing in these bulletins represent the fair market value of such apples, but even though that element was contained in the report, the defendant's case on his set-off would still be short of the proof necessary to enable him to recover anything under it, because there is no testimony anywhere in the record to show without that the defendant received, upon the sale of the damaged apples, the fair market value of apples "repacked, damaged, or off in condition." The defendant's testimony was to the effect that it [illegible] impossible for him to tell just what he did get for them [illegible] when they were sold, and in an effort to provide a market basis for the measure of his damages, he relied, by means of the trade bulletins in question, upon an [illegible] claim of apples were bringing at the time the apples involved in the set-off, were sold. But, as we have stated, the figures mentioned are not shown to be the fair market value of these apples. In addition, they are not shown to have been sold for the fair market value, and so far as the evidence in the record is concerned, the defendant may have sold them at much [illegible] than the prices appearing in the trade bulletins. The [illegible] of the [illegible] and under the claim for set-off, was, therefore, unsupported by the evidence.

As to evidence submitted by the defendant in meeting the first item of the plaintiff's claim, which was for storage and cartage charges on such apples as the defendant stored with the plaintiff, there was evidence tending to show the presence of higher temperatures than those specified in the contract, and a resulting tendency of the deterioration of the apples, and the question of whether the difference in temperature as so shown by the evidence, had resulted in any deterioration of the defendant's apples, and if so, to what extent, was submitted to the jury, and we are not able to say that they did not make the proper allowances under the issues involved in this part of the case.

As the jury merely found the issues for the plaintiff and assessed its damages at the sum of $1,487.98, we have no means of knowing just which items they allowed, and which they disallowed. Under all the evidence, we consider the final judgment entered in favor of the plaintiff in the sum of $1,096.48 as doing justice between the parties on the issues involved, and therefore, that judgment will be affirmed, the record being without reversible error under allthe facts.

AFFIRMED.

As to evidence submitted by the defendant in meeting the first item of the plaintiff's claim, which was for storage and storage charges on such apples as the defendant stored with the plaintiff, there was evidence tending to show the presence of higher temperatures than those specified in the contract, and a resulting tendency of the deterioration of the apples, and the question of whether the difference in temperatures as shown by the evidence, was caused in any measure- ation of the defendant's apples, and if so, to what extent, was submitted to the jury, - we are not able to say that they did not make the proper allowance under the issues involved in favor of the defendant.

As the jury merely found the issues for the plaintiff and assessed his damages at the sum of $3,887.90, we have no means of knowing just what the items they allowed and which they disallowed. Under all the circumstances, we consider the final judgment rendered in favor of the plaintiff in the sum of $3,000.00 as being, within between the parties on the issues involved, and therefore, that judgment must be affirmed, the record being without reversible error under all the facts.

[illegible]

256 - 23601

THE BLAISDELL MACHINERY CO.,
a corporation,

Appellant,

vs.

FRANK VOIGHTMANN and
DOLLY GASOLINE EXTRACTING CO.,
a corporation,

Appellees.

211 I.A. 492

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action brought by the appellant, The Blaisdell Machinery Co., a corporation, hereinafter referred to as the plaintiff, against the Dolly Gasoline Extracting Co., a corporation, and Frank Voightmann. Service of process was had on Voightmann only and we shall refer to him as the defendant.

The Dolly Gasoline Extracting Co. purchased certain machinery from the plaintiff for the sum of $2989.11, and offered its notes for the purchase price which the plaintiff refused to accept. After some negotiations, the Dolly Gasoline Extracting Co. offered its bond with the defendant as surety, in addition to its notes, and this was accepted by the plaintiff and the machinery was duly shipped. The notes were dated December 30, 1913, and were payable two, four and six months after date. The first one was paid March 26, 1914; the last two have never been paid. In July, 1916, this suit was begun on the bond which is in the following words:

258 - 25601

THE BLACKHALL MACHINERY CO., a corporation, Appellant, vs. FRANK VOLKENHAUER AND DOLLY GASOLINE EXTRACTING CO., a corporation, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action brought by the appellant, The Blackhall Machinery Co., a corporation, hereinafter referred to as the plaintiff, against the Dolly Gasoline Extracting Co., a corporation, and Frank Volkenhauer. Service of process was had on Volkenhauer only and we shall refer to him as the defendant.

The Dolly Gasoline Extracting Co. purchased certain machinery from the plaintiff for the sum of $2980.11, and offered its notes for the purchase price which the plaintiff refused to accept. After some negotiations, the Dolly Gasoline Extracting Co. offered its bond with the defendant as surety, in addition to its notes, and this was accepted by the plaintiff and the machinery was duly shipped. The notes were dated December 30, 1913, and were payable two, four and six months after date. The first one was paid March 26, 1914; the last two have never been paid. In July, 1916, this suit was begun on the bond which is in the following

"KNOW ALL MEN BY THESE PRESENTS, that we, Dolly Gasoline Extracting Co., a corporation, of the State of Illinois as principal, and Frank Voightmann of Chicago, Illinois, as surety are held and firmly bound unto the Blaisdell Machinery Co. of Bradford, Pa. and to its successors and assigns in the penal sum of three thousand and no/100 (3,000.00) dollars lawful money of the United States for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly, severally, and firmly by these presents:

WITNESS OUR HANDS AND SEALS THIS DAY OF DECEMBER, A.D. 1913.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that, whereas, the above bounden Dolly Gasoline Extracting Co. have executed three notes all dated December 1913 payable to the order of The Blaisdell Machinery Co. of Bradford, Pa., one for the sum of one thousand ($1,000.00) dollars due two (2) months after its date, another for the sum of one thousand ($1,000.00) due four (4) months after its date and another for nine hundred eighty-nine and eleven/100 ($989.11) dollars due six (6) months after date, all payable at Bradford, Pa. with interest at six per cent (6%) per annum which notes are given for the unpaid balance of the purchase price of a bill of machinery sold by said Blaisdell Machinery Co. to said Dolly Gasoline Extracting Co.

Now, if the said Dolly Gasoline Extracting Co. shall and do, from time to time and at all times hereafter, defend, save, keep harmless and indemnify the said Blaisdell Machinery Co. as aforesaid, its heirs, successors or assigns and all and each of them, of and from all actions, suits, costs, charges, demands, loss and expenses whatsoever (including attorney's fees) which shall or may at any time hereafter, happen or come to them or either of them for or by reason of the non-payment by said Dolly Gasoline Extracting Co. of said notes, then this obligation to be void, otherwise to remain in full force and effect.

DOLLY GASOLINE EXTRACTING CO.,
By THOMAS R. BARRON, PRES.
FRANK VOIGHTMANN (SEAL)"

After the plaintiff had closed its case, the court instructed the jury to find the issues for the defendant on the ground that the plaintiff had not made out a case. Judgment for the defendant followed, from which the plaintiff has appealed.

"KNOW ALL MEN BY THESE PRESENTS, THAT WE, MOLLY GASOLINE EXTRACTING CO., a corporation, of the State of Illinois as principal, and Frank Voigtsmann of Chicago, Illinois, as surety are held and firmly bound unto the Blatchell Machinery Co. of Bradford, Pa. and to its successors and assigns in the penal sum of three thousand and no/100 ($3,000.00) dollars lawful money of the United States for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly, severally, and firmly by these presents:

WHEREAS, OUR SEALED AND DATED THIRTY-FIRST DAY OF DECEMBER, A.D. 1913.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that, whereas, the above bounden Molly Gasoline Extracting Co. have executed three notes all dated December 1913 payable to the order of the Blatchell Machinery Co. of Bradford, Pa., one for the sum of one thousand ($1,000.00) dollars due two (2) months after the date, another for the sum of one thousand ($1,000.00) one year (4) months after the date and another for nine hundred eighty-nine and eleven/100 ($989.11) dollars due six (6) months after date, all payable at Bradford, Pa. with interest at six per cent (6%) per annum which notes are given for the unpaid balance of the purchase price of a kit of machinery sold by said Blatchell Machinery Co. to said Molly Gasoline Extracting Co.

Now, if the said Molly Gasoline Extracting Co. shall and do, from time to time and at all times hereafter, defend, save, keep harmless and indemnify the said Blatchell Machinery Co. as aforesaid, its heirs, successors or assigns on all and each of them, of and from all actions, suits, costs, charges, demands, loss and damages whatsoever (including attorney's fees) which shall or may at any time hereafter, happen or be to them or either of them for or by reason of the non-payment by said Molly Gasoline Extracting Co. of said notes, then this obligation to be void, otherwise to remain in full force and effect.

MOLLY GASOLINE EXTRACTING CO.,
By THOMAS R. MCCAIN, Jr. Pr.
FRANK V. VOIGTSMANN (SEAL)

After the plaintiff had closed its case, the court instructed the jury to find the issues for the defendant on the ground that the plaintiff had not made out a case. Judgment for the defendant followed, from which the plaintiff has appealed.

The plaintiff contends that the liability of the defendant, under this contract, is a primary one, and the defendant, on the other hand, takes the position that his obligation is collateral. By the words used in the contract between these parties, the defendant is described as a "surety". As a general rule, a surety is an original promisor and debtor from the beginning. His obligation is a primary one and not collateral. Brandt on Suretyship and Guaranty, Sec. 2, 32 Cyc. 21

In determining what the contract between given parties is, the words by which the obligation has been expressed, must prevail over those by which the parties may have described themselves. The contract involved here was quite separate and apart from the notes, although it had todo with the notes. By the words used in this contract, the defendant did not undertake that the notes would be promptly paid at maturity. The operation of the contract was limited to a condition that might arise only in case the notes were not paid at maturity, for by the words we find in this contract, expressing the defendant's obligation, he undertook, that his principal would indemnify the plaintiff for all loss and expense, including law suits and attorney's fees, which might happen or come to the plaintiff by reason of the non-payment by the principal, of the notes in question. That was the obligation he entered into, and being a surety, his liability may be said to be a primary one as to that obligation. As to the notes themselves and their payment at maturity, his obligation as expressed in this contract, was such as to

The plaintiff contends that the liability of the defendant, under this contract, is a primary one, and the defendant, on the other hand, takes the position that his obligation is collateral. By the words used in the contract between these parties, the defendant is described as a "surety". As a general rule, a surety is an original promisor and debtor from the beginning. His obligation is a primary one and not collateral. Brandt on Suretyship and Guaranty, Sec. 2, 3d Ed. 21

In determining what the contract between given parties is, the words by which the obligation has been expressed, must prevail over those by which the parties may have described themselves. The contract involved here was quite separate and apart from the notes, although it had to do with the notes. By the words used in this contract, the defendant did not undertake that the notes would be promptly paid at maturity. The operation of the contract was limited to a condition that might arise only in case the notes were not paid at maturity, for by the words we find in this contract, expressing the defendant's obligation, he undertook, that his principal would indemnify the plaintiff for all loss and expense, including his suits and attorney's fees, which might happen or come to the plaintiff by reason of the non-payment by the principal, of the notes in question. That was the obligation he entered into, and being a surety, his liability may be said to be a primary one as to that obligation. As to the notes themselves and their payment at maturity, his obligation as expressed in this contract, was such as to

make his liability a collateral one.

It will readily be seen that before the plaintiff, in a suit on this contract, seeking to enforce the defendant's primary liability on his obligation as expressed in the contract, can be said to have made out a prima facie case, evidence must be introduced showing, or tending to show, first, that the notes are past due and unpaid, and second, that the plaintiff has suffered loss or expense by reason of the failure of the principal topay the notes when they fell due. This, the plaintiff failed to do. It appeared from plaintiff's evidence that the first note for $1,000.00, had been paid, and that the remaining two were past due and had not been paid. But it was not shown that this had occasioned the plaintiff any loss. On the contrary, it affirmatively appeared that the value of the consideration for the notes, namely, the machinery which the plaintiff had sold defendant's principal, and for which, the notes were given, was being seriously contested by the latter. The plaintiff may feel that the defendant should not be permitted to go into or raise that question in a suit on his contract of suretyship. But the plaintiff saw fit to accept the contract of suretyship, by which, the defendant did not become surety for the payment of the notes at maturity, but for the indemnification of the plaintiff for such loss or damage as it might suffer because of the non-payment of the notes, and the plaintiff will be bound by the terms of the contract it has seen fit to accept. Plaintiff has called our attention to Pfaelzer v. Kau, 207 Ill.116; Ewen v. Wilbor, 208 Ill. 492; Many, Blanc & Co. v. Jacobson,

make his liability a collateral one.

It will readily be seen that before the plaintiff, in a suit on this contract, seeking to enforce the defendant's primary liability on his obligation as expressed in the contract, can be said to have made out a prima facie case, evidence must be introduced showing, or tending to show, first, that the notes are past due and unpaid, and second, that the plaintiff has suffered loss or expense by reason of the failure of the principal topay the notes when they fell due. This, the plaintiff failed to do. It appeared from plaintiff's evidence that the first note for $1,000.00, had been paid, and that the remaining two were past due and had not been paid. But it was not shown that this had occasioned the plaintiff any loss. On the contrary, it affirmatively appeared that the value of the consideration for the notes, namely, the machinery which the plaintiff had sold defendant's principal, and for which, the notes were given, was being seriously contested by the latter. The plaintiff may feel that the defendant should not be permitted to go into or raise that question in a suit on his contract of suretyship. But the plaintiff saw fit to accept the contract of suretyship, by which, the defendant did not become surety for the payment of the notes at maturity, but for the indemnification of the plaintiff for such loss or damage as it might suffer because of the non-payment of the notes, and the plaintiff will be bound by the terms of the contract it has seen fit to accept. Plaintiff has called our attention to Kleckner v. Kem, 207 Ill.116; Kemp v. Wilber, 209 Ill. 494; Mary, Mund & Co. v. Jacobson,

149 Ill. App. 240. None of these cases are in point, for, in all of them, the obligation involved, was for the prompt payment of notes as they matured, and was not such a contract as is involved in the case at bar.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

149 III. App. 840. None of these cases are in point. For, in all of them, the obligation involved, was for the prompt payment of notes as they matured, and was not such as contract as is involved in the case at bar.

Finding no error in the record, the judgment of the municipal court will be affirmed.

AFFIRMED.

420 - 23765

WEARCRETE ENGINEERING COMPANY,
a corp.,
Appellee,

vs.

NEWTON ENGINEERING COMPANY,
a corp.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

211 I.A. 494

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a suit in attachment brought by the Wearcrete Engineering Company, hereinafter referred to as the plaintiff, against the Newton Engineering Company, hereinafter referred to as the defendant. There were certain parties brought in as garnishees who are not involved here. The plaintiff filed a declaration and an affidavit of claim, and the defendant filed a plea of the general issue and also a special plea, supported by an affidavit, but no affidavit of merits was filed. On motion, later made by the defendants, an order was entered, giving it leave to withdraw its special plea. Later the court, on motion of the plaintiff, ordered the plea of the general issue stricken for want of an affidavit of merits and entered a default against the defendant for want of a plea, following which, the plaintiff's damages were assessed at $442.48, and judgment was entered against the defendant for that amount. At a subsequent term, the defendant made a motion to vacate the judgment, which motion, the court denied, and the defendant has appealed from that order.

No. 23705

WARDWELL MACHINERING COMPANY,
a corp.,
Appellee,

vs.

NEWTON ENGINEERING COMPANY,
a corp.,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

FILED

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a suit in attachment brought by the Wardwell Machinering Company, hereinafter referred to as the plaintiff, against the Newton Engineering Company, hereinafter referred to as the defendant. There were certain parties brought in as garnishees who are not involved here. The plaintiff filed a declaration and an affidavit of claim, and the defendant filed a plea of the general issue and also a special plea, supported by an affidavit, but no affidavit of merits was filed. On motion, later made by the defendants, an order was entered, giving it leave to withdraw its special plea. Later the court, on motion of the plaintiff, ordered the plea of the general issue stricken for want of an affidavit of merits and entered a default against the defendant for want of a plea, following which, the plaintiff's damages were assessed at $648.48, and judgment was entered against the defendant for that amount. At a subsequent term, the defendant made a motion to vacate the judgment, which motion the court denied, and the defendant has appealed from that order.

After the expiration of the term at which the judgment in question was entered, the court was without any jurisdiction to entertain any motion to vacate it, unless made under the provisions of Section 89 of Chapter 110 of our statutes. The motion to vacate made by the defendant was orally so far as the record discloses, and therefore, it did not comply with that section which requires the motion there provided for, to be in writing. Barnes v. Chicago City Railway Company, 185 Ill. App. 148; Holenes v. Holenes, #23437 Ill. App. Court First Dist. opinion filed April 18, 1918.

The trial court was, therefore, without any power to consider the motion, and the action of the court in overruling it, cannot be considered erroneous without regard to the reasons urged by the defendant in support of the motion.

It might further be said that even though the motion had been in writing, the trial court could not have properly allowed it. The defendant contends that it should have been allowed (1) because the case had not been regularly reached for trial, as it was not on a proper court calendar duly prepared according to law and (2) that it was improper to enter default and judgment without first striking the plea of the general issue from the files after proper notice to the defendant or its attorneys. The question of whether or not the case had been properly placed upon a printed calendar, and whether or not the action of the court was taken at a time the case had been regularly reached for trial, is immaterial, for the record shows that the defendant was in default. On the defendant's own motion,

After the expiration of the time, as much the judgment in question was entered, the court was without any jurisdiction to entertain any motion to vacate it, unless such motion the [illegible] of the [illegible] of our statutes. The motion to vacate made by the defendant was oral, so far as the record discloses, and therefore, it did not comply with that section which requires the motion to be presented [illegible], so [illegible] written. Barnes v. Chicago City Railway Company, 150 Ill. App. 348; Holmes v. Holmes, 81 Ill. App. [illegible] Ill. [illegible] filed April 20, 1910.

The trial court was, therefore, without any power to consider the motion, and the action of the court in overruling it, cannot be considered erroneous without regard to the reasons urged by the defendant in support of the motion.

[illegible] the trial court [illegible] though the motion had been in writing, the trial court [illegible] properly allowed it. [illegible] have been allowed (1) [illegible] not [illegible] requiring the trial, as [illegible] only [illegible] to [illegible] plea of the [illegible] motion to the [illegible] of [illegible] a [illegible] [illegible] the courts are [illegible] trained for trial, is immaterial, for [illegible] that the defendant was in default. [illegible] own motion.

it had been given leave to withdraw its special plea which, of course, included the affidavit of verification filed with it. That affidavit was not an affidavit of merits and did not purport to be. After the allowing of that motion, that plea was out of the case, whether or not they had ever been physically withdrawn from the files. This left the plea of the general issue without any affidavit of merits, and in view of the fact that the plaintiff had filed an affidavit of claim with its declaration, and the time for the defendant to plead had expired, the defendant was in default. Chicago Stamping Co. v. Mechanical Rubber Co. 83 Ill. App. 230. In that state of the record, the plaintiff was entitled to judgment at any time. While it is usual for the court to enter an order striking the plea from the files, in such a situation as the one presented here, such an order is not necessary, as advantage of the omission to file the affidavit of merits may be taken by motion for judgment as in case of default under the provisions of Section 55 of the Practice Act. Cramer v. Commercial Men's Association, 260 Ill. 516. It, however, appears from the record in this case that the trial court entered an order, striking the plea of the general issue from the files for want of an affidavit of merits, following which, default was entered for want of a plea. Inasmuch as the defendant was in default for want of an affidavit of merits, the plaintiff was entitled to have his formal order of default entered, and judgment awarded under the provisions of Section 55 of the Practice Act without any notice to the defendant. Cramer v. Commercial Men's

Association, *supra* at page 521.

For these reasons, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

439 - 23784

WILLIAM R. WILEY,
Appellant,

vs.

CHILDS COMPANY, a corp.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 496

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action brought by William R. Wiley, the plaintiff, against the Childs Company, the defendant, wherein the plaintiff sought to recover the sum of thirty dollars as the fair and reasonable value of his overcoat, which was stolen or lost in the restaurant of the defendant. At the close of the evidence, the trial court instructed the jury to return a verdict in favor of the defendant, following which, judgment was entered against the plaintiff, from which he has appealed.

On the day in question, the plaintiff entered the defendant's restaurant, where he had been in the habit of getting his luncheon for some time. He hung his hat and coat on a hook on the wall and sat down at a neighboring table, and ordered his luncheon. When ready to leave, he went to get his overcoat, and it was gone. He called the matter to the attention of the cashier, and he rapped on a bell, and some moments later, the manager of the restaurant appeared. An effort was made to find the coat, but it was unsuccessful. All

No. 5274

WILLIAM H. WILEY,

Appellant,

vs.

CHICAGO CONCRETE, a corp.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SCHWICK delivered the opinion of the court.

This was an action brought by William H. Wiley, the plaintiff, against the Chicago Company, the defendant, wherein the plaintiff sought to recover the sum of thirty dollars as the fair and reasonable value of his overcoat, which was stolen or lost in the restaurant of the defendant. At the close of the evidence, the trial court the defendant, following which, judgment was entered against the plaintiff, from which he has appealed.

On the day in question, the plaintiff entered the defendant's restaurant, where he had been in the habit of eating his luncheon for some time. He hung his hat and coat on a hook on the wall and sat down in a neighboring booth, and ordered his luncheon. Just ready to leave, he went to get his overcoat, but it was gone. He called the matter to the attention of the cashier, and he replied on a call, one some moments later, the manager of the restaurant appeared. An effort was made to find the coat, but it was unsuccessful. All

the menu cards for that day had been destroyed, but the testimony showed that there had always been printed on these cards, the words "not responsible for personal property unless checked by the cashier." The evidence further showed that there were two signs, one on each of the side walls of the restaurant room, permanently built into the walls, and approximately 14 X 24 inches in size, reading "not responsible for personal property unless checked by the management." The plaintiff testified that he never noticed the wording referred to on the menu cards, nor the signs on the walls. The evidence further showed that facilities were provided for checking overcoats and other personal property, consisting of brass checks and straps which were at the cashier's desk, and that any patron wishing overcoats or other articles checked, could have that service without charge.

The plaintiff seeks to recover on the theory that the loss of his overcoat was occasioned through the defendant's negligence. He does not allege a bailment in his statement of claim, and the facts referred towould not establish a bailment. Montgomery v. Ladging, 61 N. Y. S. 840; Patterson v. Hammerstein, 39 N. Y. S. 1039. However, the plaintiff contends that the fact that the defendant had the notices referred to, on the walls of the restaurant and printed on the menu cards, is immaterial, unless the plaintiff had knowledge of them citing Vogelsang v. Fredekin, 133 Ill. App. 361; La Salle Restaurant and Opera House v. McMasters, 85 Ill. App. 577. These cases are not in point, for, in those cases, there was evidence

the meal cards for that day had been destroyed, but the testimony showed that there had always been printed on these cards, the words 'not responsible for personal property unless checked by the cashier.' The evidence further showed that there were two signs, one on each of the side walls of the restaurant room, permanently built into the walls, and approximately 18 x 24 inches in size, reading 'Not Responsible for Personal Property Unless Checked by the Management.' The plaintiff testified that he never noticed the warning printed on the meal cards, nor the signs on the walls. The evidence further showed that facilities [illegible] for checking arrangements for the property of [illegible], consisting of brass [illegible] and [illegible] at the cashier's desk, and that any patron [illegible] overcoats or other articles checked, could [illegible] without charge.

The plaintiff's [illegible] proceeds on the theory that the loss of his overcoat was occasioned through the defendant's negligence. [illegible] ment in his statement of claim, [illegible] would not [illegible] a bailment. [illegible] v. [illegible], 61 N. Y. S. 364; [illegible] v. [illegible], [illegible] However, the plaintiff [illegible] defendant and the [illegible], as the relation [illegible] the restaurant [illegible] 41 [illegible], [illegible] the plaintiff and [illegible] v. [illegible], 133 Ill. App. 302; [illegible] and [illegible] v. [illegible], 98 Ill. App. 377. [illegible] are not in point, [illegible], in these cases, [illegible] and evidence

tending to establish a bailment, for the garments involved were turned over by their owners to the restaurant employes, and the court held that certain notices, reading: "Not responsible for hats, coats or umbrellas" could be of no avail unless it were shown that the patron knew of them. It may be true that such notices would not relieve a restaurant keeper of the legal consequences of an actual bailment, unless it were shown that the bailor knew of them. But where the facts do not establish a bailment, as in this case, the presence of these notices, is material, on the question of the alleged negligence of the defendant in managing or conducting its restaurant. The burden of proof on the question of the defendant's negligence was upon the plaintiff, and it seems clear that the facts shown by the evidence as stated above, failed to make out any case of negligence on the part of the defendant. The presence of hooks along the wall may be construed as an invitation to the patron to hang his hat and coat there, if he wished to retain custody of it. The presence of the notices in question on the menu cards and on the walls was reasonably sufficient notice to patrons that other facilities for the keeping of such garments were available, and, if a patron wished to deposit his overcoat in the exclusive possession of the defendant and thus establish a bailment, he should have availed himself of the accommodations which the defendant provided for that purpose. In this case, he did not do so, and in our opinion, the evidence shows that the defendant was not guilty of negligence as alleged, in the management and

tending to establish a bailment, for the gumming involved were turned over by their owners to the restaurant employee, and the court held that certain notices, reading: "Not responsible for hats, coats or umbrellas" could be of no avail unless it were shown that the patron knew of them. It may be true that plain notices would not relieve a restaurant keeper of the legal consequences of an actual bailment, unless it were shown that the bailor knew of them. But where the facts do not establish a bailment, as in this case, the presence of these notices, in conjunction, on the question of the alleged negligence of the defendant in managing or conducting his restaurant. The burden of proof on the question of the defendant's negligence was upon the plaintiff, who is seen clear that the facts shown by the evidence do not give rise, failing to make out any case of negligence on the part of the defendant. The presence of books along the wall may be considered as an invitation to the patron to keep his hat and coat there, if no change is merely evident to it. The presence of the notices in question on the walls cannot be the basis for reasonably sufficient notice to patrons that other facilities for the keeping of such garments will be available, and, if a person wished to depart in a contract in the exclusive possession of the defendant and thus establish a bailment, he should have evidence clearly of the circumstances which the defendant provided for that purpose. In this case, he did not do so, and in our opinion, the evidence showed that a bailment was not guilty of negligence as alleged, in his management and

general supervision exercised by its employes over the restaurant in the matter of protection of the property of its patrons. Montgomery v. Ladging, supra; Harris v. Childs Unique Dairy Co., 84 N. Y. S. 260; Duckworth v. Codington, 136 N. Y. S. 68; Wentworth v. Riggs, 143 N.Y.S. 955; Scheef v. Food Craft Co., 165 N.Y.S. 209; Gibson v. Pennsylvania R. Co. 92 At. 59; Simpson v. Rourke, 34 N.Y.S. 11.

A number of cases have been called to our attention by the plaintiff which we think are not in point, for they involve such special circumstances as constitute a bailment. For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

general supervision exercised by its employes over the instrument in the matter of protection of the property of its patrons. Washington v. Langlois, supra; Martin v. Omaha Electric Light Co., 84 N. Y. S. 820; Wadsworth v. Gedimaton, 126 N. Y. S. 08; Kennedy v. Mills, 126 N.Y.S. 830; Dunnet v. Food Stuff Co., 168 N.Y.S. 820; Jibson v. Pennsylvania R. Co. 98 At. 80; Simmons v. Hawkes, 34 N.Y.S. 11.

A number of cases have been called to our attention by the plaintiff which we think are not in point, for they involve such special circumstances as constitute a bailment. For the reasons stated, the judgment of the municipal Court is affirmed.

AFFIRMED.

151 - 24070

LEON A. BEREZNIAK,
Appellee,

vs.

BEAUREGARD F. MOSELEY and
IDLEWOOD HOTEL AND INVESTMENT
COMPANY, a corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 497

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court against the defendants for the sum of $150, and the defendants bring the case here by appeal for review.

The claim of plaintiff is based upon allegations in the statement of claim wherein it is stated that plaintiff had been employed by defendants as attorney. There is some conflict in the evidence, but we are inclined to the view that there is sufficient evidence in the record to sustain the judgment of the trial court. In any event, the appeal must be dismissed.

On page 2 of the abstract of record the following appears:

> "Appeal prayed and allowed, First District of Illinois. Bond $250; bill of exceptions sixty (60) days."

The order allowing the appeal as it appears in the transcript of record is as follows:

> "Now comes the plaintiff and prays that appeal in this case be granted to the Appellate Court for the First District of Illinois, which appeal is granted on condition that said party file herein an appeal bond conditioned according to law in the sum of $250, with security to be approved by a judge of this court within 20 days from this date."

The appeal bond, which was filed December 1, 1917, was signed by the defendants. The record before us shows that the defendants did not pray for, and were not al-

LEON A. BIRKENIAK,
Appellee,

vs.

BRAUNSBERG F. MOSKLEY and
INLEWOOD HOTEL AND INVESTMENT
COMPANY, a corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the municipal court against the defendants for the sum of $150, and the defendants bring the case here by appeal for review.

The claim of plaintiff is based upon allegations in the statement of claim wherein it is stated that plaintiff had been employed by defendants as attorney. There is some conflict in the evidence, but we are inclined to the view that there is sufficient evidence in the record to sustain the judgment of the trial court. In any event, the appeal must be dismissed.

On page 2 of the abstract of record the following appears:

"Appeal prayed and allowed, First District of Illinois. Bond $250; bill of exceptions sixty (60) days."

The order allowing the appeal as it appears in the transcript of record is as follows:

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The appeal bond, which was filed December 1, 1917, was signed by the defendants. The record before us shows that the defendants did not pray for, and were not al-

lowed, an appeal to this court. The transcript of record shows that an appeal prayed for by plaintiff was allowed. Plaintiff did not perfect an appeal, and none was prayed for or allowed to the defendants.

The appeal of the defendants must be dismissed.

APPEAL DISMISSED.

lowed, an appeal to this court. The transcript of record shows that an appeal prayed for by plaintiff was allowed. Plaintiff did not perfect an appeal, and none was prayed for or allowed to the defendants.

The appeal of the defendants must be dismissed.

APPEAL DISMISSED.

209 - 24132

MARK LEVY and ARTHUR LEVY,
Appellees,

vs.

ALBERT C. BARLEY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 498

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court in favor of plaintiffs for the sum of $2,339.81. The action was brought on a bond under which the defendant bound himself to pay the plaintiffs the penal sum of $3,000; the condition of the bond is as follows:

> "That whereas said Albert C. Barley has this day sold to Mark Levy and Arthur C. Levy, two (2) One Thousand Dollar ($1,000.00) Gold Bonds of the Kansas City Oil Company of Kansas City, Kansas, with twelve (12) interest coupons attached to each other for thirty dollars ($30.00) each, payable semi-annually on July 2nd and January 2nd each year, and said Albert C. Barley has and herewith guarantees the payment of the principal and interest on said bonds, as they severally mature, and should the Company default in payment of said interest at any time, said Albert C. Barley agrees to pay same within ten days from date of said default to Mark Levy and Arthur C. Levy, their heirs and assigns, and
>
> Further should a default in interest payments result in a foreclosure of the mortgage securing said bonds, and the property of the Company be sold at a price that will net less than par for the above mentioned bonds, and accrued interest, then said Albert C. Barley is held and firmly bound to pay to Mark Levy & Arthur C. Levy, their heirs and assigns, on demand the amount of said deficiency together with any costs and attorneys fees there may be incurred in collection of said balance due, or in the collection of either the principal or interest on said bonds."

The evidence introduced on the trial shows that the bonds referred to in the above instrument matured January 2, 1917, and their payment was secured by a trust deed given to the Metropolitan Trust & Savings Bank as trustee. It was provided in this trust deed that if the Kansas City Oil Company failed to pay any interest on the bonds when due and pay-

209 - 24182

MARK LEVY and ARTHUR LEVY,
Appellees,

vs.

ALBERT C. BARLEY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

21114.408

MR. PRESIDING JUSTICE DIVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the circuit court in favor of plaintiffs for the sum of $2,339.81. The action was brought on a bond under which the defendant bound himself to pay the plaintiffs the penal sum of $5,000; the condition of the bond is as follows:

"That whereas said Albert C. Barley has this day sold to Mark Levy and Arthur C. Levy, two (2) one thousand dollar ($1,000.00) Gold bonds of the Kansas City Oil Company of Kansas City, Kansas, with twelve (12) interest coupons attached to each other for thirty dollars ($30.00) each, payable semi-annually on July 2nd and January 2nd each year, and said Albert C. Barley has and herewith guarantees the payment of the principal and interest on said bonds, as they severally mature, and should the Company default in payment of said interest at any time, said Albert C. Barley agrees to pay same within ten days from date of said default to Mark Levy and Arthur C. Levy, their heirs and assigns, and

Further should a default in interest payments result in a foreclosure of the mortgage securing said bonds, and the property of the company be sold at a price that will not less than par for the above mentioned bonds, and accrued interest, then said Albert C. Barley is said and firmly bound to pay to Mark Levy & Arthur C. Levy, their heirs and assigns, on demand the amount of said deficiency together with any costs and attorney fees there may be incurred in collection of said balance due, or in the collection of either the principal or interest on said bonds."

The evidence introduced on the trial shows that the bonds referred to in the above instrument matured January 2, 1917, and their payment was secured by a trust deed given to the Metropolitan Trust & Savings Bank as trustee. It was provided in this trust deed that if the Kansas City Oil Company failed to pay any interest on the bonds when due and pay-

able and such interest remained unpaid for 30 days, then the bonds should become due and payable and the trustee, when requested in writing, after notice in writing, should proceed to foreclose the trust deed.

The Kansas City Oil Company failed to pay interest on two bonds on July 2, 1911, and January 2 and July 2, 1912. The defendant paid these installments with interest to the plaintiffs. The Kansas City Oil Company went into bankruptcy some time prior to July, 1912, and the plaintiffs filed the two bonds in question as a claim in the bankruptcy proceedings. The bonds were for $1,000 each, and at the time suit was brought $125 had been paid on account of the principal of both bonds.

The contention is that in construing a contract of guaranty the intention of the parties will control and the undertaking as against a guarantor will not be extended beyond the terms of the guarantee. In the instrument sued upon the defendant expressly guarantees "the payment of the principal and interest on the said bonds as they severally mature." The bonds and trust deed, which was executed to secure their payment, appear to be but a single transaction, and in determining the liability of defendant upon his guarantee these instruments should be read together. Kraft v. Hora, 159 Ill. App. 303.

> "The time of payment as fixed in the note may be controlled by a separate written agreement made at the time of the execution of the note." Hunter v. Clarke, 184 Ill. 158.

The obligation of the defendant was to pay the bonds and the interest becoming due thereon at maturity, and the date of maturity is not necessarily the date specified in the bonds themselves. It may be, and we think in this case that recourse should be had, in determining the date of maturity, to the trust deed. This instrument provides that

able and such interest remained unpaid for 30 days, then the bonds should become due and payable and the trustee, when requested in writing, after notice in writing, should proceed to foreclose the trust deed.

The Kansas City Oil Company failed to pay interest on two bonds on July 2, 1921, and January 2 and July 2, 1922. The defendant paid these instalments with interest to the plaintiffs. The Kansas City Oil Company went into bankruptcy some time prior to July, 1923, and the plaintiffs filed the two bonds in question as a claim in the bankruptcy proceedings. The bonds were for $1,000 each, and at the time suit was brought $125 had been paid on account of the principal of both bonds.

The contention is that in construing a contract of guaranty the intention of the parties will control and the undertaking as against a guarantor will not be extended beyond the terms of the guarantee. In the instrument used upon the defendant expressly guarantees "the payment of the principal and interest on the said bonds as they severally mature." The bonds and trust deed, which was executed to secure their payment, appear to be but a single transaction, and in determining the liability of defendant upon his guarantee these instruments should be read together. Kraft v. Hoge, 158 Ill. App. 522.

> "The time of payment as fixed in the note may be controlled by a separate written agreement made at the time of the execution of the note." Burton v. Clarke, 184 Ill. 158.

The obligation of the defendant was to pay the bonds and the interest becoming due thereon at maturity, and the date of maturity is not necessarily the date specified in the bonds themselves. It may be, and we think in this case that reference should be had, in determining the date of maturity, to the trust deed. This instrument provides that

if the maker of the bonds "shall fail or refuse to pay the said bonds or any of them or any installment of interest thereon when due and payable upon presentation at the office of the Metropolitan Trust & Savings Bank of Chicago, in the State of Illinois, and the same shall remain unpaid for a period of thirty days, then all of the bonds secured by this deed of trust shall become due and payable."

The contention is that the action by the plaintiff was prematurely brought. We do not agree with this contention. The evidence shows that interest was due and unpaid on the bonds at the time the action was brought, although the principal of the bond did not become due for some time thereafter. Under the trust deed the failure to pay interest for a period of 30 days caused the maturing of the bond.

It is insisted by defendant that if the date of maturity of the bonds be accelerated by the bankruptcy proceedings or by default in the payment of interest, he, the defendant, would be required to pay interest on $2,000 until January 2, 1917. We do not think there is merit in this contention. If the bonds matured under the terms of the trust deed, or by bankruptcy action, and plaintiffs were paid the amount due them by way of principal and interest on these matured bonds, it is difficult to see how the defendant would be required to make payment "of interest after the principal had been paid." It was the right of the plaintiffs to enforce payment of the bonds and interest due thereon at maturity, that is, when the bonds matured under the terms of the contract between the maker of the bonds and the holder thereof.

We think there is some force in the contention of counsel for plaintiff that Section 16 of the Bankruptcy Act was intended in the interest of creditors to prevent a co-debtor or guarantor from escaping liability in a contract

if the maker of the bonds "shall fail or refuse to pay the said bonds or any of them or any instalment of interest thereon when due and payable upon presentation at the office of the Metropolitan Trust & Savings Bank of Chicago, in the State of Illinois, and the same shall remain unpaid for a period of thirty days, then all of the bonds secured by this deed of trust shall become due and payable."

The contention is that the action by the plaintiff was prematurely brought. We do not agree with this contention. The evidence shows that interest was due and unpaid on the bonds at the time the action was brought, although the principal of the bond did not become due for some time thereafter. Under the trust deed the failure to pay interest for a period of 30 days caused the maturing of the bond.

It is insisted by defendant that if the date of maturity of the bonds be accelerated by the bankruptcy proceedings or by default in the payment of interest, he, the defendant, would be required to pay interest on $2,000 until January 2, 1917. We do not think there is merit in this contention. If the bonds matured under the terms of the trust deed, or by bankruptcy action, and plaintiffs were paid the amount due them by way of principal and interest on these matured bonds, it is difficult to see how the defendant would be required to make payment "of interest after the principal had been paid." It was the right of the plaintiffs to enforce payment of the bonds and interest due thereon at maturity, that is, when the bonds matured under the terms of the contract between the maker of the bonds and the holder thereof.

We think there is some force in the contention of counsel for plaintiff that section 16 of the Bankruptcy Act was intended in the interest of creditors to prevent a debtor or guarantor from escaping liability in a contract

by reason of the bankruptcy of a debtor.

We do not think the court erred in its refusal to strike out certain answers of a witness, one of the plaintiff's, who testified; this testimony was admitted without objection. The motion was "to strike out the answers of the witness." Counsel for defendant say that the witness testified to a conclusion. Even if it be conceded that counsel is correct, we think it was his duty to point out to the trial Judge the grounds upon which the motion to strike was based. 12 Ency. of Evidence, 205; Chicago & Eastern Ill. R. R. Co. v. Wallace, 202 Ill. 129.

If we are correct in our conclusion that the action herein was not prematurely brought, then the judgment in favor of plaintiffs is not excessive. The contract sued upon provided for the payment of interest until the bonds matured. At the time suit was brought $125 had been paid on account of the principal of both bonds. Interest was allowed on the balance down to the date of the judgment. The bankruptcy of the maker of the bonds and the failure to meet the interest payments ipso facto rendered the defendant liable to plaintiffs on his bond, and under this bond he agreed to pay the principal as well as the interest when due. The refusal to hold defendant's proposition of law No. 6 was not error. With reference to other claimed errors, we do not think such errors if committed should cause a reversal of the judgment.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

by reason of the borrowing by of a debtor.

We do not think the court erred in its refusal to strike out certain answers of a witness, one of the plaintiffs, who testified; this testimony was admitted without objection. The motion was to strike out the answers of the witness." Counsel for defendant say that the witness testified to a conclusion. Even if it be conceded that counsel is correct, we think it was his duty to point out to the trial judge the precise ground which the motion to strike was based. In Ivey, et al. v. Wildenhage, 4 Ga. Appeals 3 (Western Ill. [illegible] v. [illegible], [illegible]).

If we [illegible] our consideration [illegible] the motion herein [illegible] correctly [illegible]. [illegible] judgment in favor of plaintiffs is not excessive. [illegible] suit upon provided in the [illegible] of a trust, until the bonds matured. At the time suit was brought [illegible] had been paid on account of the principal of bond bonds. Interest was allowed on the balance [illegible] the date of the [illegible]. The bankruptcy of the maker of the [illegible] the failure to meet the interest payments [illegible] the defendant liable to plaintiffs [illegible], and [illegible] to pay the principal [illegible]. The [illegible] to hold differently [illegible]. [illegible] error. [illegible] reference to other claims [illegible] think such [illegible] would cause a [illegible] of the judgment.

[illegible]

219 - 24144

JACOB GOTTLIEB,
Appellee,

vs.

ANDREWS & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed by plaintiff it was alleged in substance that the defendant was indebted to plaintiff in the sum of $155; that plaintiff in the year 1916, being under the age of 21 years, entered into three contracts with the defendant under which plaintiff agreed to purchase certain shares of corporation stock; that plaintiff paid to defendant the sum of $155 on said agreements; that plaintiff became of age on October 6, 1916, and that he thereafter disaffirmed the said agreements and demanded the return of the $155 paid by him to defendant. The trial court entered judgment in favor of the plaintiff for the amount claimed and the defendant brings the case here by appeal for review.

It is contended by defendant that plaintiff failed to introduce any evidence of the purchase of the stock in question during his minority or of his disaffirmance of the contract within a reasonable time after he became of age. The plaintiff filed an affidavit in support of his statement of claim, and it does not appear that the defendant filed any affidavit denying the allegations of the statement of claim, or in support of any defense to the action.

A part of Section 55, chap. 110, R. S. of Illinois is as follows:

219 - 26166

JACOB GOTTLIEB,
Appellee,

vs.

AMERES & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed by plaintiff it was alleged in substance that the defendant was indebted to plaintiff in the sum of $100; that plaintiff in the year 1916, being under the age of 21 years, entered into three contracts with the defendant under which plaintiff agreed to purchase certain shares of corporation stock; that plaintiff paid to defendant the sum of $100 on said agreements; that plaintiff became of age on October 6, 1917, and that he thereafter disaffirmed the said agreements and demanded the return of the $100 paid by him to defendant. The trial court entered judgment in favor of the plaintiff for the amount claimed and the defendant brings the case here by appeal for review.

It is contended by defendant that plaintiff failed to introduce any evidence of the purchase of the stock in question during his minority or of his disaffirmance of the contract within a reasonable time after he became of age. The plaintiff filed an affidavit in support of his statement of claim, and it does not appear that the defendant filed any affidavit denying the allegations of the statement of claim, or in any wit of any defense to the action.

A part of Section 23, Chap. 11, R. S. of Illinois is as follows:

> "If the plaintiff in any suit upon contract express or implied for payment of money shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant * * * he shall be entitled to judgment as in cases of default, unless the defendant or his agent or attorney shall file with his plea an affidavit, etc."

Under this statute plaintiff was entitled to a judgment, and we do not think this right was waived by the introduction of evidence in support of the statement of claim.

The contention that the rules of the Municipal court would not permit a default, may have been the reason why plaintiff introduced evidence on the trial of the cause, but whether this be so or not, the rules of that court are not before us. The rules of the Municipal court are not preserved in the record by bill of exceptions or otherwise, and they do not appear to have been introduced in evidence. This court will not take judicial notice of these rules. Lanigan v. J. C. Henderson & Co., 188 Ill. App. 569.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

"If the plaintiff in any suit upon contract express or implied for payment of money shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant * * * he shall be entitled to judgment as in cases of default, unless the defendant or his agent or attorney shall file with his plea an affidavit, etc."

Under this statute plaintiff was entitled to a judgment, and we do not think this right was waived by the introduction of evidence in support of the statement of claim.

The contention that the rules of the municipal court would not permit a default, may have been the reason why plaintiff introduced evidence on the trial of the cause, but whether this be so or not, the rules of that court are not before us. The rules of the municipal court are not preserved in the record by bill of exceptions or otherwise, and they do not appear to have been introduced in evidence. This court will not take judicial notice of these rules. Hanigan v. C. C. Henderson & Co., 188 Ill. App. 509.

The judgment of the municipal court will be affirmed.

AFFIRMED.

228 - 24153

DISTRIBUTORS COAL COMPANY,
a corporation,
Appellee,

vs.

CHARLES O. RACE and AMBROSIA
Y. RACE,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 501

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Charles O. Race and Ambrosia Y. Race, defendants, on June 27, 1917, executed two promissory notes, one for the sum of $1,694.44 and one for $3,134.02, payable 100 days after date to the order of Distributors Coal Company, the plaintiff. The notes were endorsed to Taylor Coal Company and on June 29, 1917, a judgment by confession was entered thereon in favor of Taylor Coal Company; this judgment was paid in full.

The evidence introduced on the trial shows that April 30, 1917, the plaintiff delivered 71,300 pounds of coal to the Race apartments. Through error this coal was billed at 41,300 pounds instead of 71,300 pounds, the amount actually delivered. Mr. Frisby, plaintiff's general manager, testified that the notes referred to were delivered to him and that at the time of such delivery he had no knowledge that a mistake had been made in billing the coal. At the time the notes were delivered the plaintiff and defendants had arrived at a settlement of the balance due the plaintiff. This error was discovered after June 1st and from the testimony of Frisby the court was authorized in finding that the error was unknown to him at the time the notes were delivered. At the time the notes were delivered the account between plaintiff and de-

228 - 24153

DISTRIBUTORS COAL COMPANY,
a corporation,
Appellee,

vs.

CHARLES C. RACE and AMBROSIA
Y. RACE,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Charles C. Race and Ambrosia Y. Race, defendants, on June 27, 1917, executed two promissory notes, one for the sum of $1,694.44 and one for $3,154.02, payable 100 days after date to the order of Distributors Coal Company, the plaintiff. The notes were endorsed to Taylor Coal Company and on June 29, 1917, a judgment by confession was entered thereon in favor of Taylor Coal Company; this judgment was paid in full.

The evidence introduced on the trial shows that April 30, 1917, the plaintiff delivered 71,300 pounds of coal to the Race apartments. Through error this coal was billed at 41,300 pounds instead of 71,300 pounds, the amount actually delivered. Mr. Priebe, plaintiff's general manager, testified that the notes referred to were delivered to him and that at the time of such delivery he had no knowledge that a mistake had been made in billing the coal. At the time the notes were delivered the plaintiff and defendants had arrived at a settlement of the balance due the plaintiff. This error was discovered after June 1st and from the testimony of Priebe the court was authorized in finding that the error was unknown to him at the time the notes were delivered. At the time the notes were delivered the account between plaintiff and de-

fendant was not in dispute. A balance was due at that time to plaintiff and the notes given incorrectly stated the amount of this balance.

It is generally true, as contended, that where a party without fault or fraud of an adverse party takes judgment for a sum less than is actually claimed, he is estopped to bring his second action for any balance due him before the entry of judgment. The authorities cited by counsel for defendant fully sustain this contention. The distinction, however, between the cases cited and the instant case is that the record does not disclose that the party plaintiff here has taken any judgment in its favor against the defendants. The notes in question were endorsed to Taylor Coal Company, which entered judgment thereon.

It appears from the evidence that at the time the notes were delivered the parties to the transaction believed that the amounts stated therein represented the balance then due plaintiff on the account. Had plaintiff retained the notes and had judgment not been entered thereon, the error in computing the balance due could have been shown by parol. The judgment referred to was entered in favor of an endorsee of the notes. The plaintiff was not a party to this action, and we are inclined to the view that, as against it, the bringing of an action for the recovery of the amount due on the notes did not preclude plaintiff, in a separate action, from claiming the amount actually due it at the time the notes were delivered. Ditch v. Vollhardt, 82 Ill. 134.

In the case of Carvill v. Mirror Films, Inc., 165 N. Y. Suppl. 676, relied upon by defendants, the plaintiff's action was for unliquidated damages for the breach of a contract of employment, and the court held therein, correctly, we think, that a party cannot split a cause of action for a

fendant was not in dispute. A balance was due at that time to plaintiff and the notes given incorrectly stated the amount of this balance.

It is generally true, as contended, that where a party without fault or fraud of an adverse party takes judgment for a sum less than is actually claimed, he is estopped to bring his second action for any balance due him before the entry of judgment. The authorities cited by counsel for defendant fully sustain this contention. The distinction, however, between the cases cited and the instant case is that the record does not disclose that the party plaintiff here has taken any judgment in its favor against the defendants. The notes in question were conveyed to Taylor Coal Company, which entered judgment thereon.

It appears from the evidence that at the time the notes were delivered the parties to the transaction believed that the amounts stated therein represented the balance then due plaintiff on the account. Had plaintiff retained the notes and had judgment not been entered thereon, the error in computing the balance due could have been shown by parol. The judgment referred to was entered in favor of an officer of the notes. The plaintiff was not a party to this action, and we are inclined to the view that, as against it, the principle of an action for the recovery of the amount due on the notes did not preclude plaintiff, in a separate action, from claiming the amount actually due it at the time the notes were delivered. Ditch v. Vollhardt, 92 Ill. 154.

In the case of Carvill v. Mirror Films, Inc., 105 N. Y. Supp. 676, relied upon by defendants, the plaintiff's action was for unliquidated damages for the breach of a contract of employment, and the court held therein, correctly, we think, that a party cannot split a cause of action for a

single breach of a contract and bring several actions thereon by assigning part of his claim. In the instant case the plaintiff, under the authorities, would have had the legal right, before judgment was entered, to have compelled a payment of the full amount due it notwithstanding its acceptance of the notes. Its acceptance of the notes, under the circumstances of the case, should be regarded as a partial payment only of the account due it. The plaintiff had legal title to the notes and its negotiation of them did not operate against it as though a judgment had been taken in its favor thereon. The endorsement of the notes to the Taylor Coal Company did not have the effect of extinguishing the indebtedness due plaintiff on the account.

It is also contended that the judgment against defendant Ambrosia Y. Race should be reversed. The defendant Charles O. Race testified that he was the owner of the Race Apartments, but notwithstanding this fact we think there was some evidence in the record tending to show that Ambrosia Y. Race was liable for the whole balance due the plaintiff; she signed the notes in question; she was made a party defendant to the proceedings and she did not deny joint liability under oath as provided by the statutes.

In Hamilton v. The Century Manufacturing Co. 180 Ill. App. 100, the court said:

> "It has also been held that the defendant without filing a plea denying joint liability, may successfully claim such defense where it affirmatively appears from the evidence that no joint liability existed under the contract sued on. United Workmen v. Zuhlke, 129 Ill. 298; Powell Co. v. Finn, 198 Ill. 567; Heidelmeir v. Hecht, 145 Ill. App.116."

We do not think it can be said that it affirmatively appears from the record in this case that no joint liability existed under the contract sued on.

The judgment of the Municipal Court will be affirmed

AFFIRMED.

single breach of a contract and bring several actions thereon by assigning part of his claim. In the instant case the plaintiff, under the authorities, would have had the legal right, before judgment was entered, to have compelled a payment of the full amount due it notwithstanding a acceptance of the notes. Its acceptance of the notes, under the circumstances of the case, should be regarded as a partial payment only of the account due it. The plaintiff had legal title to the notes and its negotiation of them did not operate against it as though a judgment had been taken in its favor thereon. The endorsement of the notes to the Taylor Coal Company did not have the effect of extinguishing the indebtedness due plaintiff on the account.

It is also contended that the judgment against defendant Ambrosia Y. Rose should be reversed. The defendant Charles J. Rose testified that he was the owner of the Rose Apartments, but overwhelming this fact he then there was some evidence in the record tending to show that Ambrosia Y. Rose was liable for the whole balance due the plaintiff; she signed the notes in question; she was made a party defendant to the proceedings and she is not a joint liability under such as provided by the statutes.

In Hamilton v. The Kentucky Handle Mfg. Co.,

150 Ill. App. 140, the court said:

> "It has also been held that the defendant [illegible] out filing a plea denying joint liability, may successfully plead such defense where it affirmatively appears from the evidence that no joint liability existed when the contract sued on. United States v. Bahnke, 146 Ill. App. 1; Gaff v. Ayer, 1 Ill. App. 1; Hirn v. Schiffelbein, 158 Ill. 567; Hirschheimer v. Mount, 140 Ill. App. 1."

We do not think it can be said that it affirmatively appears from the record in this case that no joint liability existed under the contract sued on.

The judgment of the municipal court will be affirmed

AFFIRMED.

238 - 24163

MARTIN JANCI and STEFAN PALANSKY,
Appellees,

vs.

STEFAN, alias STEVE CERNY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

211 I.A. 502

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Martin Janci and Stefan Palansky filed a bill of complaint in the Circuit Court of Cook County against Steve Cerny and John Cerny, his brother, in which bill it was charged in substance that the four parties named had been engaged as partners in a wool pulling business, and that the defendant Steve Cerny had, by the wrongful use of certain partnership assets, secured profits in excess of $5,000 for which he refused to account to complainants. Answers were filed to the bill and the cause was referred to a master in chancery who, in his report to the court, found that on April 5th, 1916, Janci and Steve Cerny entered into an agreement under which Janci contributed the sum of $250 and Steve Cerny $4.60, which money was used in buying six bags of wool which were deposited with the National Wool Company until December 8, 1916, when they were sold; that on August 1, 1916, the four parties named entered into a partnership agreement for the purpose of buying skins and "pulling wool"; that Janci contributed thereto $1050, Palansky $500, John Cerny $500 and Steve Cerny $51.77, making a total sum of $2,101.77; that this money was used by the partnership in purchasing skins and wool; that under the partnership agreement Steve Cerny was to have charge of the business and the wool owned by the partnership was to stand in his name, and that the profits or losses of the business should be divided equally among the partners; that Janci, who had no experience in the work contemplated, was to continue at his work

238 - 24163

MARTIN JANCI and STEFAN JAJANOVY,
Appellees,

vs.

STEFAN, alias STEVE CERNY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

FILED

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Martin Janci and Stefan Jajanovy filed a bill of complaint in the Circuit Court of Cook County against Steve Cerny and John Cerny, his brother, in which bill it was charged in substance that the four parties named had been engaged as partners in a wool pulling business, and that the defendant Steve Cerny had, by the wrongful use of certain partnership assets, secured profits in excess of $3,000 for which he refused to account to complainants. Answers were filed to the bill and the cause was referred to a master in chancery who, in his report to the court, found that on April 8th, 1910, Janci and Steve Cerny entered into an agreement under which Janci contributed the sum of $850 and Steve Cerny $4.6 , which money was used in buying six bags of wool which were shipped with the National Wool Company until December 6, 1910, when they were sold; that on August 1, 1910, the four parties named entered into a partnership agreement for the purpose of buying skins and "pulling wool"; that Janci contributed another $1050, formerly $800, John Cerny $500 and Steve Cerny $61.77, making a total sum of $2,161.77; that this money was used by the partnership in purchasing skins and wool; that under the partnership agreement Steve Cerny was to have charge of the business and the wool owned by the partnership was to stand in his name, and that the profits or losses of the business should be divided equally among the partners; that Janci, who had no experience in the work contemplated, was to continue at his work

as a machinist and that the other three parties were to work for the partnership at usual wages.

The master further found that Steve Cerny purchased certain skins for the sum of $3,717.80; that for a return of these skins to the seller he received a credit of $1,538.40 and also a credit of $77.63 for pulling wool from "shearlings" belonging to the seller, leaving a balance due on account of $2,101.77; that this balance was paid in cash, of which the defendant Steve Cerny contributed $50.77; that the wool which was pulled from these skins was deposited with the National Wool Company and the warehouse receipts therefor were made out in the name of Steve Cerny.

The master also found that Steve Cerny, while the other three parties were engaged in the work of the partnership, entered into a contract with one John Svatik to act as his foreman in a wool pulling business, under which contract Cerny was to receive, in addition to the wages usually paid for such work, one-third of the profits of the business.

The evidence introduced before the master shows that Steve Cerny did not disclose his employment under this contract to his partner Janci; that he did say to Palansky, "We are going to work for John Svatik because he promised me a certain percent." Steve Cerny, Palansky and John Cerny thereafter worked about two months for Svatik. The master found, and the evidence shows, that about August 14, 1916, Steve Cerny turned over to Svatik two warehouse receipts for the wool deposited with the National Wool Company. Svatik then pledged these receipts to secure loans made to him of about $2,000. A profit of $182.88 was realized by the partnership from a sale of the wool purchased by Janci and Steve Cerny in August, 1916, and sold December 8, 1916, for which profits Cerny has accounted to his partners.

as a machinist and that the other three parties were to work for the partnership at usual wages.

The master further found that Steve Gerry purchased certain skins for the sum of $6,777.86; that for a return of these skins to the seller he received a credit of $1,858.40 and also a credit of $77.65 for pulling wool from "sheepskins" delivered to the seller, leaving a balance due on account of $5,101.77; that this balance was paid in cash, of which the defendant Steve Gerry contributed $50.77; that the wool which was pulled from these skins was deposited with the National Wool Company and the warehouse receipts therefor were made out in the name of Steve Gerry.

The master also found that Steve Gerry, while the other three parties were engaged in the work of the partnership, entered into a contract with one John Jovian to act as his foreman in a wool pulling business, under which contract Gerry was to receive, in addition to the wages usually paid for such work, one-half of the profits of the business.

The evidence introduced before the master shows that Steve Gerry did not disclose his employment under this contract to his partner Jacob; [illegible] "We are going to work for John Jovian because he proved to me a certain concept." Steve Gerry, John Gay and John Gerry thereafter worked under the auspices of Jovian. The master found, and the evidence shows, that about August 1, 1916, Steve Gerry turned over to Jovian two warehouse receipts for the wool delivered with the National Wool Company. Jovian then pledges these receipts to secure loans made to him of about $5,000. A portion of $1,000 was repaid by the partnership from a sale of the wool purchased by Jacob and Steve Gerry in August, 1916, and said December 1, 1916, the union profits Gerry has accounted to his partners.

Cerny realized a profit altogether of $5,524.78 from his contract and transactions with John Svatik. While the evidence shows that he refused to account to his partners for all of these profits, it does appear that February 18, 1917, he paid Palansky the money advanced by Palansky to the partnership, together with his share of the profits on wool purchased in August, 1916; on March 21, 1917, he paid Janci on the same basis and in addition thereto he paid Janci $151.20 and Palansky $75.60, the latter two sums being the amounts allowed by him as their share of the profits accruing out of the use of the warehouse receipts by John Svatik.

The decree of the court is in all respects in accordance with the report and recommendations of the master. The defendant Steve Cerny brings the case here by appeal.

From the large volume of evidence heard by the master it is evident that the chief controversy between the parties is as to whether the partnership agreement between them was of a general or limited nature. The parties contradict each other in material ways, but from the whole evidence we think it perfectly clear that when the parties entered into business together they intended to invest their money and services in a general skin purchasing and wool pulling business.

The decree of the court provides for a dissolution of the partnership and for a distribution of the sum of $5,524.78, which the evidence shows was received by Steve Cerny as the result of his transactions with John Svatik. There can be no doubt of the wrongful conduct of Steve Cerny in delivering the warehouse receipts which belonged to the partnership for the use and benefit of himself and Svatik; this was an unauthorized diversion of the partnership property, and the complainants have a clear legal right to a finding that the defendant, Steve Cerny, be required to

Gerry realized a profit altogether of $5,524.78 from his contract and transactions with John Avetik. While the evidence shows that he refused to account to his partners for all of these profits, it does appear that February 15, 1917, he paid January the money advanced by January to the partnership, together with his share of the profits on wool purchased in August, 1916; on March 21, 1917, he paid Janol on the same basis and in addition thereto he paid Janol $1,51.20 and January $75.00, the latter two sums being the amounts allowed by him as their share of the profits accruing out of the use of the warehouse receipts by John Avetik.

The decree of the court is in all respects in accordance with the report of the referee on the consideration of the matter. The defendant Steve Gerry brings the case here by appeal.

From the large volume of evidence heard by the master it is evident that the chief controversy between the parties is as to whether the partnership agreement between them was of a general or limited nature. The parties contradict each other in material ways, but from the whole evidence we think it perfectly clear that when the parties entered into business together they intended to invest their money and services in a general skin purchasing and wool pulling business.

The decree of the court provides for a dissolution of the partnership and for a distribution of the sum of $5,524.78, which the evidence shows was received by Steve Gerry as the result of his transactions with John Avetik. There can be no doubt of the wrongful conduct of Steve Gerry in delivering the warehouse receipts which belonged to the partnership for the use and benefit of himself and Avetik; this was an unauthorized diversion of the partnership property, and the complainants have a clear legal right to a finding that the defendant, Steve Gerry, be required to

account to them for the profits derived by him from the use of this property.

It is contended by the defendant, who brings the case here, that a material variance exists between the theory of complainant's case as shown by the bill, and the decree of the court. There is no merit in this contention. The theory of the bill is that the defendant had made a wrongful use of the partnership funds, from which he had derived profits, and the decree, as we understand it, proceeds on the theory that the transactions between Svatik and Steve Cerny were transactions of the partnership and were on behalf of and for its benefit. The decree as we read it does not find as a fact that the partnership had entered into any agreement with Svatik and Cerny. The language of this part of the decree, when read with the whole decree, leads us to the conclusion that the chancellor meant to hold that the defendant's conduct was such as to create a resulting trust in favor of the partnership. It is true that the decree did not specifically find that a resulting trust resulted from defendant's conduct, but we think that no other conclusion can be arrived at from a careful examination of the whole decree.

In Smith v. Smith, 85 Ill. 189, the Supreme court held that if the proofs in a case and the facts stated in a bill showed the existence of a resulting trust "that was sufficient without naming it a resulting trust."

The evidence does not show a supplemental agreement, as contended by defendant. The real nature of the transactions between him and Svatik were unknown to complainants. While it appears that Steve Cerny, Palansky and John Cerny were employed by Svatik, we think the evidence fails to show that this employment constituted a modification in any way of the partnership agreement. Cerny's duty in relation to his part-

account to them for the profits derived by him from the use of this property.

It is contended by the defendant, who brings the case here, that a material variance exists between the theory of complainant's case as shown by the bill, and the decree of the court. There is no merit in this contention.

The theory of the bill is that the defendant had made a wrongful use of the partnership funds, from which he had derived profits, and the decree, as we understand it, proceeds on the theory that the transactions between Jewett and Steve Gerny were transactions of the partnership and were on behalf of and for its benefit. The decree as we read it does not find as a fact that the partnership had entered into any agreement with Jewett and Gerny. The language of this part of the decree, when read with the whole decree, leads us to the conclusion that the chancellor meant to hold that the defendant's conduct was such as to create a resulting trust in favor of the partnership. It is true that the decree did not specifically find that a resulting trust resulted from defendant's conduct, but we think that no other conclusion can be arrived at from a careful examination of the whole decree.

In Smith v. Sohlem, 88 Ill. 180, the language court held that if the proofs in a case had the facts stated in a bill showed the existence of a resulting trust that was sufficient without doing it a rescinding trust."

The evidence does not show a supplemental agreement, as contended by defendant. The real issue of the transactions between him and Jewett were unknown to complainants. While it appears that Steve Gerny, Jerry and John Gerny were employed by Jewett, we think the evidence fails to show that this employment constituted a modification in any way of the partnership agreement. Gerny's duty in relation to his part-

ners was clearly to preserve the partnership assets and not to deal with them for his individual benefit without the consent of his partners. We think the evidence shows that his conduct was in the main secretive and that the profits he derived from his relations with Svatik were in the main due to his violation of a duty which he owed to his partners.

The decree does not, as urged, require the defendant to contribute the $15 a week paid to him by Svatik subsequent to August, 1916. He received as profits from his venture with Svatik the sum of $5,524.78 in addition to the $15 per week paid to him. The acceptance on March 21, 1917, by Janci of $151.20 and by Pelansky of $75.60 did not excuse defendant from accounting to complainants for the actual profits which he derived by his use of the assets of the partnership. Even if it be admitted that this money was, in form, paid in settlement of their claims against defendant, the evidence shows that they received the money without full knowledge of his wrongful use of the warehouse receipts. Phillips v. Reynolds, 236 Ill. 121.

The court did not err in taxing the costs of the proceedings against the defendant. There is sufficient evidence in the record to warrant the evident conclusion of the master that the defendant had placed the wool which was owned by the partnership at the disposal of John Svatik, and that this conduct was fraudulent as against the rights of complainants.

The decree of the Circuit court is affirmed.

AFFIRMED.

here was clearly to preserve the partnership assets and not to deal with them for his individual benefit without the consent of his partners. We think the evidence shows that his consent was in the main secretive and that the profits he derived from his relations with Swift were in the main due to his violation of a duty which he owed to his partners.

The decree does not, as urged, require the defendant to contribute the $15 a week paid to him by Swift subsequent to August, 1916. He received as profits from his venture with Swift the sum of $5,804.75 in addition to the $15 per week paid to him. The accounts on March 31, 1917, by Janet of $151.50 and by Lathrop of $75.00 did not excuse defendant from accounting to complainants for the actual profits which he derived by his use of the assets of the partnership. Even if it be admitted that this money was, in form, paid in settlement of their claims against defendant, the evidence shows that they received the money without full knowledge of his wrongful use of the warehouse receipts. Lathrop v. Reynolds, 236 Ill. 121.

The court did not err in taxing the costs of the proceedings against the defendant. There is sufficient evidence in the record to warrant the evident conclusion of the master that the defendant had placed the wool which was owned by the partnership at the disposal of John Swift, and that this conduct was fraudulent as against the rights of complainants.

The decree of the circuit court is affirmed.

AFFIRMED.

246 - 24171

JOHN SEXTON & COMPANY, a corporation, Appellant, vs. ENGLISH CANNING AND MANUFACTURING CO., a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 504

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of the defendant.

In the statement of claim filed in the trial court by plaintiff it was alleged that the defendant was indebted to it in the sum of $960 as damages for the breach of a contract under the terms of which the defendant agreed to sell and deliver certain merchandise to plaintiff.

The defendant filed an affidavit of merits in which it set up its defense to the case made by plaintiff in its statement of claim. The caption of this affidavit is as follows:

"STATE OF ILLINOIS)
CITY OF CHICAGO) ss. In the Municipal Court of Chicago.
First District)

JOHN SEXTON & COMPANY,)
a corporation)
vs.)
ENGLISH CANNING AND)
MANUFACTURING COMPANY,)
a corporation.)

STATE OF ILLINOIS)
COUNTY OF COOK) ss."
CITY OF CHICAGO)

This affidavit was signed by Sam Benz as president of the defendant company, and the jurat thereto is as follows:

246 - 241 Ill

JOHN DEXTER & COMPANY,
a corporation,
Appellant,

vs.

ENGLISH CANNING AND MANUFACTURING
CO., a corporation,
Appellee.

APPEAL FROM A MUNICIPAL
COURT OF CHICAGO.

SILLA. 504

MR. PRESIDING JUSTICE DUNN
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of the defendant.

In the statement of claim filed in the trial court by plaintiff it was alleged that the defendant was indebted to it in the sum of $[illegible] as damages for the breach of a contract under which, for a [illegible] the defendant agreed to sell and deliver certain merchandise to plaintiff.

The defendant filed an affidavit of merits in which it set up 16 defenses to the claim made by plaintiff in its statement of claim. The question of this affidavit is as follows:

"STATE OF ILLINOIS }
COUNTY OF COOK } ss.
CITY OF CHICAGO }

JOHN DEXTER & COMPANY,
a corporation
vs.
ENGLISH CANNING AND
MANUFACTURING COMPANY,
a corporation.

} In the Municipal Court of Chicago.

This affidavit was signed by Jas Hess as president of the defendant company, and the jurat thereto is as follows:

"Subscribed and sworn to before me this 1st day of November, A. D. 1917.
And I hereby certify that by virtue of the laws of Indiana, I am authorized to administer oaths.
John L. Luckett,
Notary Public.
My commission expires Oct. 25, 1921."

It is insisted that it appears that the affidavit of merits was sworn to in Cook County before a notary public of Indiana, who had no legal authority to administer oaths in Cook County, Illinois. The record before us does not disclose that the question presented here was raised at any time in the trial court. No bill of exceptions or stenographic report appears in the record, and we are unable, under the circumstances, to say that evidence was not introduced on the trial tending to prove that the affidavit in question was in fact sworn to in the State of Indiana. So far as we are apprised the plaintiff made no effort to present this question to the trial court, and if it be true that it went to trial upon the issues presented by the statement of claim and the alleged affidavit of merits, it must be held that it has waived its right to present the point for decision here. The case is a fourth-class case and hence no written pleadings are required. The case is to be regarded as whatever the evidence introduced makes it. Edgerton v. Chicago, etc., 240 Ill. App. 311.

It may be conceded that the caption of the affidavit above set forth shows, prima facie, that the affidavit was not sworn to in the State of Indiana. We think, however, that if the point had been pressed in the trial court the defendant could have shown by proper evidence that the affidavit was in fact sworn to in Indiana. Whether such evidence was introduced on the trial cannot be determined from the record here. Van Dusen v. People, 78 Ill. 645.

"Subscribed and sworn to before me this 1st day of November, A. D. 1917.

And I hereby certify that by virtue of the laws of Indiana, I am authorized to administer oaths.

John D. Roesch,
Notary Public.

My commission expires Oct. 25, 1921."

It is insisted that it appears that the affidavit of merits was sworn to in Cook County before a notary public of Indiana, without any authority to administer oaths in Cook County, Illinois. The record before us does not disclose that the question presented here was raised at any time in the trial court. In spite of exceptions or stenographic report appears in the record, and we are unable, under the circumstances, to say that evidence was not introduced on the trial tending to prove that the affidavit in question was in fact sworn to in the State of Indiana. So far as we are advised, plaintiff made no effort to present this question to the trial court, and if it be true that it went to trial upon the issues presented by the statement of claim and the filed affidavit of merits, it must be held that it was waived its right to present the point for decision here. The case is a return-order case and hence no written pleadings are required. The case is to be regarded as whatever the evidence introduced makes it.

Ingersoll v. Chicago, etc., 166 Ill. App. 311.

It may be conceded that the majority of the affidavit above set forth cause, prima facie, that the affidavit was not sworn to in the State of Indiana. We think, however, that if the point had been raised in the trial court, the defendant could have shown by proper evidence that the affidavit was in fact sworn to in Indiana. Whether such evidence was introduced on the trial cannot be determined from the record here. Van Ingen v. People, 98 Ill. 646.

It is asserted by counsel for plaintiff that defendant was required under certain rules of the Municipal court to file an affidavit of merits to the claim of plaintiff. The rules relied upon by counsel are not contained in the record before us. So far as we can determine they were not introduced on the trial and we cannot take judicial notice of their contents. An additional transcript of record was filed here June 3, 1915. This additional record contains what purports to be copies of rules 18 and 19 of the Municipal court certified to by one of the Judges of that court. The certification of the Judge does not make the rules part of the record of this case.

In Lanigan v. Henderson & Co., 188 Ill. App. 569, it was held that an objection to an affidavit of merits on the grounds that it did not comply with rules of the Municipal court could not be urged on review, where the rules of that court were not preserved in the record.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

It is asserted by counsel for plaintiff that defendant was required under certain rules of the municipal court to file an affidavit of merits to the claim of plaintiff. The rules relied upon by counsel are not contained in the record before us. So far as we can determine they were not introduced on the trial and we cannot take judicial notice of their contents. An additional transcript of record was filed here June 5, 1916. This additional record contains what purports to be copies of rules 16 and 19 of the municipal court certified to by one of the judges of that court. The certification of the judge does not make the rules part of the record of this case.

In Lundgren v. Henderson & Co., 164 Ill. App. 589, it was held that an objection to an affidavit of merits on the grounds that it did not comply with rules of the municipal court could not be urged on review, where the rules of that court were not preserved in the record.

The judgment of the municipal court will be affirmed.

AFFIRMED.

275 - 24202

C. E. PRATT, doing business as
Logan Square Automobile Station,
Appellee,

vs.

INDIAN RIVER GARDEN CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

211 I.A. 505

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of plaintiff for the sum of $150.76 entered of record in that court on November 21, 1917.

Certified copies of the appeal bond in the record show that an appeal was taken by defendant from the judgment and not from the order overruling a motion to vacate the judgment entered in the cause on December 17th.

It is asserted in each of eight assignments of error appearing in the abstract of record that the court erred in refusing to vacate the judgment in question. An affidavit was filed in the cause upon which the motion to vacate was based. We have examined this affidavit and it is our opinion that the court did not abuse its discretion in disallowing the motion. In any event it appears ~~that~~ in the order disallowing the motion that the defendant was given 60 days within which to file a bill of exceptions. No bill of exceptions or stenographic report is included in the record, and we are not permitted to review the action of the trial Judge who overruled the motion to vacate; even if it be conceded that the defendant has perfected his appeal from the order in question, his failure to preserve for review, by bill of exceptions, the affidavit in support of the motion compels us to affirm the judgment of the Municipal court. The judgment is not void upon its face. Boyle v. Chytraus, 125 Ill. 370.

AFFIRMED.

275 - 24202

C. E. PRATT, doing business as Logan Square Automobile Station, Appellee,	
vs.	APPEAL FROM MUNICIPAL
INDIAN RIVER GARDEN CORPORATION, Appellant.	COURT OF CHICAGO.

211 I.A. 505

MR. PRESIDING JUSTICE DRYER

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of plaintiff for the sum of $150.70 entered of record in that court on November 21, 1917.

Certified copies of the appeal bond in the record show that an appeal was taken by defendant from the judgment and not from the order overruling a motion to vacate the judgment entered in the cause on December 17th.

It is asserted in each of eight assignments of error appearing in the abstract of record that the court erred in refusing to vacate the judgment in question. An affidavit was filed in the cause upon which the motion to vacate was based. We have examined this affidavit and it is our opinion that the court did not abuse its discretion in disallowing the motion. In any event it appears ~~xxxx~~ in the order disallowing the motion that the defendant was given 30 days within which to file a bill of exceptions. No bill of exceptions or stenographic report is included in the record, and we are not permitted to review the action of the trial judge who overruled the motion to vacate; even if it be conceded that the defendant has perfected his appeal from the order in question, his failure to preserve for review, by bill of exceptions, the affidavit in support of the motion compels us to affirm the judgment of the Municipal court. The judgment is not void upon its face. Boyle v. Chytrus, 125 Ill. 370.

AFFIRMED.

307 - 24234

HYMAN SILVERMAN,
Appellee,

vs.

HARRY KORSHAK and ISAAC LASHKOVITZ,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 506

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court against the defendant and in favor of the plaintiff for $639.21.

In the statement of claim filed by plaintiff it appears that the claim of plaintiff is based upon a judgment note which it is alleged was executed by the defendant, I. Lashkovitz, made payable to the order of Harry Korshak and by him endorsed and delivered to plaintiff. An affidavit of merits was filed by defendants on August 4, 1917, which set up in substance that the defendant Korshak had delivered the note in question to the Lawndale Sash and Door Company; that the defendant Lashkovitz was merely an accommodation party to the note and that the Lawndale Sash and Door Company had full knowledge of this fact; that the Lawndale Sash and Door Company received the note from Korshak in payment of an indebtedness due it by him and that said Lawndale Sash and Door Company had agreed that the time for payment of the note would be extended from time to time for a period of two years; that the plaintiff did not receive the note by endorsement and delivery from Korshak and that plaintiff was not a bona fide holder thereof, and that suit was instituted in his name "in an endeavor to preclude the defendants therein from asserting the defense hereinabove set forth.

HYMAN SILVERMAN, Appellee,	
vs.	APPEAL FROM MUNICIPAL
MARRY KORSHAK and ISAAC LASHKOVITZ, Appellants.	COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court against the defendant and in favor of the plaintiff for $635.21.

In the statement of claim filed by plaintiff it appears that the claim of plaintiff is based upon a judgment note which it is alleged was executed by the defendant, I. Lashkovitz, made payable to the order of Harry Korshak and by him endorsed and delivered to plaintiff. An affidavit of merits was filed by defendants on August 4, 1917, which set up in substance that the defendant Korshak had delivered the note in question to the Lawndale Bank and Door Company; that the defendant Lashkovitz was merely an accommodation party to the note and that the Lawndale Bank and Door Company had full knowledge of this fact; that the Lawndale Bank and Door Company received the note from Korshak in payment of an indebtedness due it by him and that said Lawndale Bank and Door Company had agreed that the time for payment of the note would be extended from time to time for a period of two years; that the plaintiff did not receive the note by endorsement and delivery from Korshak and that plaintiff was not a bona fide holder thereof, and that suit was instituted in his name "in an endeavor to preclude the defendants therein from asserting the defense hereinabove set forth.

On December 27, 1917, a jury found in favor of the plaintiff and judgment was entered in his favor against defendants for the sum of $636.82. This verdict and judgment were vacated on January 4, 1918, and on January 9, 1918, an order was entered that "the affidavit of merits of defendants stand as a plea in abatement." On January 10, 1918, an order was entered of record in the cause, a part of which is as follows:

> "This matter coming on again to be heard on the agreement of the parties that the affidavit of merits of the said defendants, Harry Korshak and Isaac Lashkovitz, heretofore filed, stands as an affidavit in support of a motion in the nature of a plea in abatement of the action, and not as an affidavit of merits to the action;
>
> It is ordered that said affidavit of merits of Harry Korshak and Isaac Lashkovitz heretofore filed as aforesaid, stand as an affidavit in support of a motion in the nature of a plea of abatement to the action, and not as an affidavit of merits."

On motion of plaintiff the affidavit of merits or plea in abatement was stricken from the files, and it is insisted here that the court erred in so doing. The point raised by counsel is not before us. The plea in abatement or affidavit of merits, whatever the document may be called, was on motion of the trial court stricken from the files and it became thereby no longer a part of the record. The instrument is not preserved in a bill of exceptions.

In Witteman Company v. Goeke, 200 Ill. App. 108, it was held that a ruling of the court striking a pleading from the files cannot be reviewed in a court of appeals unless the pleading and ruling thereon are preserved in a bill of exceptions. Town of Scott v. Artman, 237 Ill. 394. The pleading in question, which is set out in the abstract, is on its face an insufficient answer to the claim of plaintiff. It appears therein that Korshak, the defendant, delivered the note in question in payment of an indebtedness, and the

On December 27, 1917, a jury found in favor of the plaintiff and judgment was entered in his favor against defendants for the sum of $656.82. This verdict and judgment were vacated on January 4, 1918, and on January 9, 1918, an order was entered that "the affidavit of merits of defendants stand as a plea in abatement." On January 10, 1918, an order was entered of record in the cause, a part of which is as follows:

> "This matter coming on again to be heard on the agreement of the parties that the affidavit of merits of the said defendants, Harry Horenk and Jerome Hashovitz, heretofore filed, stands as an affidavit in support of a motion in the nature of a plea in abatement of the action, and not as an affidavit of merits to the action;
>
> It is ordered that said affidavit of merits of Harry Horenk and Jerome Hashovitz heretofore filed as aforesaid, stand as an affidavit in support of a motion in the nature of a plea of abatement to the action, and not as an affidavit of merits."

On motion of plaintiff the affidavit of merits or plea in abatement was stricken from the files, and it is insisted here that the court erred in so doing. The point raised by counsel is not before us. The plea in abatement or affidavit of merits, whatever the document may be called, was on motion of the trial court stricken from the files and it became thereby no longer a part of the record. The instrument is not preserved in a bill of exceptions.

In Kitchen Company v. Greene, 200 Ill. App. 108, it was held that a ruling of the court striking a pleading from the files cannot be reviewed in a court of appeals unless the pleading and ruling thereon are preserved in a bill of exceptions. Town of Lecoy v. Altman, 227 Ill. 394. The pleading in question, which is set out in the abstract, is on its face an insufficient answer to the claim of plaintiff. It appears therein that Horenk, the defendant, delivered the note in question in payment of an indebtedness, and the

promise to extend the payment of the note from time to time seems to be unsupported by any consideration.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

promise to extend the payment of the note from time to time seems to be unsupported by any consideration.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

317 - 24244

ABRAHAM LEPINE,
Appellee,

vs.

CHICAGO WASTE COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 507

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of the plaintiff and against the defendant for the sum of $200.

The only point raised by the briefs of counsel is whether the trial court should have admitted certain evidence which it is claimed if admitted would have shown that plaintiff's claim was based upon an attempt on his part to represent, as attorney, conflicting and hostile interests.

Plaintiff, an attorney, testified that June 20, 1917, he called defendant company on the telephone, that he talked with Mr. Hofnauer, an officer of the company, that he told Hofnauer he had certain information that defendant was being robbed, which information he would give to him if he would call at plaintiff's office; that he, plaintiff, disclosed this information to Hofnauer and the source from which it came to plaintiff; that Hofnauer said he would investigate the matter and if it should develop that defendant was being robbed he would remunerate plaintiff for this information; that three days later Hofnauer called plaintiff on the telephone, saying to him, "Come over quick, we got the gang. I find we have been robbed of about $15,000 in the past year. Two of the men are in the office now." In response to this call plaintiff went to defendant's office and he there ex-

ABRAHAM LEWINE,
Appellee,

vs.

CHICAGO WASTE COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

SILLA, CJ

MR. PRESIDING JUSTICE DAVIS
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of the plaintiff and against the defendant for the sum of $250.

The only point raised by the briefs of counsel is whether the trial court should have admitted certain evidence which it is claimed if admitted would have shown that plaintiff's claim was based upon an attempt on his part to represent, as attorney, conflicting and hostile interests.

Plaintiff, an attorney, testified that June 20, 1917, he called defendant company on the telephone, that he talked with Mr. Heinen, an officer of the company, that he told Heinen he had certain information that defendant was being robbed, which information he would give to him if he would call at plaintiff's office; that he, plaintiff, disclosed this information to Heinen and the source from which it came to plaintiff; that Heinen said he would investigate the matter and if it about [illegible] that defendant was being robbed he would remunerate plaintiff for this information; that three days later defendant called plaintiff on the telephone, saying to him, "Come over quick, we got the gang. I find we have been robbed of about $15,000 in the past year. Two of the men are in the office now." In response to this call plaintiff went to defendant's office and he stated ex-

amined two men who were in the office and later took them to the East Chicago Avenue police station, where he further examined them for the purpose of getting information relative to the alleged thefts from defendant. The evidence shows that plaintiff spent some further time and performed other services on the same day in an effort to discover the identity of the alleged thieves. On the following morning plaintiff and Hofnauer met at the East Chicago Avenue station and plaintiff prepared two "John Doe" warrants; he was present when one Goldstein was arrested and he and Hofnauer went to the place of business of a man named Richards, in the basement of which was found 10 bales of waste. Plaintiff testified that he was with Hofnauer and the police officers until 3 o'clock in the afternoon of that day; that Hofnauer appeared to be "cooling off a bit," and that plaintiff left him with the suggestion that if he was wanted he could be called at this office; that that was the last plaintiff had to do with the case except to appear as a witness before the grand jury.

There is a direct conflict between Hofnauer and plaintiff as to what was said by them at different times, with reference to the alleged employment of plaintiff as attorney for defendant. The evidence discloses that Lepine, an attorney, signed the complaints upon which warrants were issued for the arrest of persons charged with the alleged thefts, and Hofnauer says that Lepine said he did this so as to protect the defendant from liability for the arrests. The defendant offered to show by the testimony of a witness that plaintiff's appearance at defendant's office on the day preceding the issuance of the warrants was brought about by the request of one Feldman, who was in defendant's office at the time plaintiff was called upon the telephone. An objection

mained two men who were in the office and later took them to the East Chicago Avenue police station, where he further examined them for the purpose of getting information relative to the alleged theft from defendant. The evidence shows that plaintiff spent some further time and performed other services on the same day in an effort to discover the identity of the alleged thieves. On the following morning plaintiff and Hofmeister met at the East Chicago Avenue station and plaintiff prepared two "John Doe" warrants; he was present when one Goldstein was arrested and he and Hofmeister went to the place of business of a man named Blockrub, in the basement of which was found 10 bales of waste. Plaintiff testified that he was with Hofmeister and the police officers until 3 o'clock in the afternoon of that day; that Hofmeister appeared to be "cooling off a bit," and that plaintiff left him with the suggestion that if he was wanted he could be called at this office; that that was the last plaintiff had to do with the case except to appear as a witness before the grand jury.

There is a direct conflict between Hofmeister and plaintiff as to what was said by them at different times, with reference to the alleged employment of plaintiff as attorney for defendant. The evidence discloses that Lepine, an attorney, signed the complaints upon which warrants were issued for the arrest of persons charged with the alleged theft, and Hofmeister says that Lepine said he did this so as to protect the defendant from liability for the arrests. The defendant offered to show by the testimony of a witness that plaintiff's appearance at defendant's office on the day preceding the issuance of the warrants was brought about by the request of one Feldman, who was in defendant's office at the time plaintiff was called upon the telephone. An objection

to this offer was sustained. We think this evidence should have been admitted.

It should be kept in mind that we are dealing here with the conduct of an attorney, an officer of the court. The contention is that Lepine's voluntary offer of information to the defendant's officers, and his efforts in procuring the arrest of persons charged with the thefts, were made for the purpose of protecting his client, Feldman, in a pending controversy between him and one Richards, who, it is intimated, together with Feldman, received certain property which it is charged was stolen from the defendant company. Hofnauer testified that plaintiff said to him:

> "I have a client named Feldman who knows something about some goods being stolen from your place. I can't give you very much information, can't give any names. I can't say very much, but this Feldman has been a salesman for Richards Company and there has been another salesman there by the name of Morowitx. They have been selling waste which they claim came from the Chicago Waste Company and was stolen from there. We want to get the goods on this Richards. My client has a case against him. I don't remember the particulars of the case. I said, 'If you get any information would you mind calling me up?' On Monday morning Feldman came to the office of defendant and said, 'Did you hear any more about this stock being stolen?' I said, 'We have a line on it - nothing else,' to which he replied, 'If you get anything will you call up Lepine?' (the plaintiff). I said I would."

We think in view of this testimony the defendant should have been permitted to show that Lepine's presence in the case was for the purpose of protecting or aiding his alleged client, Feldman. If Hofnauer's testimony be true then there is some evidence in the record tending to show that Feldman was the client of plaintiff, and from the excluded evidence and that admitted it might fairly be argued that Lepine's efforts to discover and prosecute persons charged with stealing defendant's property were for the purpose of aiding Feldman in his controversy with Richards. Believing,

to this offer was sustained. We think this evidence should have been admitted.

It should be kept in mind that we are dealing here with the conduct of an attorney, an officer of the court. The contention is that Lepine's voluntary offer of information to the defendant's officers, and his efforts in procuring the arrest of persons charged with the thefts, were made for the purpose of protecting his client, Feldman, in a pending controversy between him and one Richards, who, it is intimated, together with Feldman, received certain property which it is charged was stolen from the defendant company. Hofmeister testified that plaintiff said to him:

> "I have a client named Feldman who knows something about some goods being stolen from your place. I can't give you very much information, can't give any names. I can't say very much, but this Feldman has been a salesman for Richards Company and there has been another salesman there by the name of Morowitz. They have been selling waste which they claim came from the Chicago Waste Company and was stolen from there. We want to get the goods on this Richards. My client has a case against him. I don't remember the particulars of the case. I said, 'if you get any information would you mind calling me up?' On Monday morning Feldman came to the office of defendant and said, 'Did you hear any more about this stock being stolen?' I said, 'We have a line on it - nothing else,' to which he replied, 'If you get anything will you call up Lepine?' (the plaintiff). I said I would."

We think in view of this testimony the defendant should have been permitted to show that Lepine's presence in the case was for the purpose of protecting or aiding his alleged client, Feldman. If Hofmeister's testimony be true then there is some evidence in the record tending to show that Feldman was the client of plaintiff, and from the excluded evidence and that admitted it might fairly be argued that Lepine's efforts to discover and prosecute persons charged with stealing defendant's property were for the purpose of aiding Feldman in his controversy with Richards. Believing,

as we do, that it was error to exclude this evidence, the judgment of the Municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

as we do, that it was error to exclude this evidence, the judgment of the Municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

88 - 24000

JOHN E. MERZ and CHARLES G. MERZ, trading, etc.,
Appellants,

vs.

LEON R. STEWART,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 508

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant bought in Chicago a motor cycle and side car from one J. A. Cowles and paid him therefor $150. The cycle and car were manufactured in Chicago by the Excelsior Motor Manufacturing Co. Before concluding the purchase defendant telephoned the manufacturer inquring as to Cowles' title, and was informed that the cycle and car were paid for. It appears that Cowles bought the cycle and car from plaintiffs in Indianapolis, Indiana, and that plaintiffs had taken from Cowles a conditional sales contract therefor. Plaintiffs demanded the cycle and car from defendant, who refused to surrender the same and thereupon this suit in replevin was brought. On a trial before the court without a jury there was a finding and judgment for defendant.

The conditional sales contract was not recorded in any place either in Indiana or Illinois.

Plaintiffs contend that the rights of the parties must be determined by the law of Indiana, and that by the law of that State the contract between plaintiffs and Cowles was good not only as between themselves, but as against third parties.

Under the circumstances of this case we think that the question of the contract between plaintiffs and

88 - 24000

JOHN R. WEBB and CHARLES
C. WEBB, trading, etc.,
Appellants,

vs.

LEON R. STEWART,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

SEPT. 1908

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant bought in Chicago a motor cycle and side car from one L. A. Cowles and paid him therefor $150. The cycle and car were manufactured in Chicago by the Excelsior Motor Manufacturing Co. Before concluding the purchase defendant telephoned the manufacturer inquiring as to Cowles' title, and was informed that the cycle and car were paid for. It appears that Cowles bought the cycle and car from plaintiffs in Indianapolis, Indiana, and that plaintiffs had taken from Cowles a conditional sales contract therefor. Plaintiffs demanded the cycle and car from defendant, who refused to surrender the same and thereupon this suit in replevin was brought. In a trial before the court without a jury there was a finding and judgment for defendant.

The conditional sales contract was not recorded in any place either in Indiana or Illinois.

Plaintiffs contend that the rights of the parties must be determined by the law of Indiana, and that by the law of that State the contract between plaintiffs and Cowles was good not only as between themselves, but as against third parties.

Under the circumstances of this case we think that the question of the contract between plaintiffs and

Cowles is not a matter for our determination in this proceeding. Plaintiffs put it within the power of Cowles to remove the cycle and car out of the State of Indiana, thereby vesting him with prima facie evidence of ownership and with apparent power to sell the same free from their claim. To hold otherwise in the circumstances of this case would stop the sale of this kind of personal property.

Defendant had no more reason to investigate Cowles' title in Indiana than in any other State. Especially is this so when the evidence gained by defendant showed that the cycle and car had been manufactured in Chicago. Comity between States does not proceed to such an extreme. The following observations by the late Mr. Justice Adams in Rosenbaum v. Lawes, 77 Ill. App. 295, are pertinent here:

> "We cannot conclude this opinion, however, without some suggestions as to the rule, apparently supported by numerous adjudications, that the constructive notice of a mortgage resulting from its acknowledgment and recording in the State in which it is executed, is also constructive notice in other States, and to the citizens of other States to which the mortgaged property may be removed, thus giving to the law of the State in which the mortgage is executed extra-territorial effect. The courts base this rule on the doctrine of interstate comity, but it seems to us that the doctrine should not be extended to the detriment of citizens of the State. In many cases the rule that citizens of this State are bound by constructive notice of a chattel mortgage executed and recorded in another State, necessarily and inevitably operates to the detriment of such citizens."

This case was affirmed in 179 Ill. 112.

In Illinois the possession of personal property is prima facie evidence of ownership, and unless a lien is reserved in accord with the statutes of the State, the possessor may convey a good title to a bona fide purchaser, provided he is without notice of any intervening equities or claims.

The judgment of the Municipal Court is right and is affirmed.

AFFIRMED.

Cowles is not a matter for our determination in this proceeding. Plaintiffs put it within the power of Cowles to remove the cycle and car out of the frame of Indiana, thereby vesting him with prima facie evidence of ownership [illegible] with apparent power to sell the same free from their claim. To hold otherwise in the circumstances of this case would stop the sale of this kind of personal property.

We deem it not worth to investigate Cowles' title in Indiana from the [illegible] state. Certainly it has so much the preference [illegible] that the cycle and car [illegible] in Indiana. Certainly [illegible] does not proceed [illegible] extent, the following observations by the Supreme Court, Justice [illegible] Rosenbaum v. Lewis, 77 [illegible], and, [illegible] court said:

> "We cannot conclude that [illegible], however, without some [illegible] as to the rule, [illegible] supported by numerous [illegible] from the [illegible] and recording in the [illegible] to which it is [illegible], [illegible] effective notice in other states, and to the citizens of other [illegible] to which the mortgaged property may be removed, thus [illegible] the law of the [illegible] in which the mortgage is executed [illegible]. The courts have this rule on the [illegible] of [illegible] country, but it seems to be [illegible] not be extended to the detriment of citizens of the [illegible]. In many cases the rule that citizens of this state are bound by constructive notice of a chattel mortgage [illegible] cuted and recorded in another [illegible] and [illegible] avitably operates to the detriment of our citizens."

This case was affirmed in 174 Ill. 116.

In Illinois the possession of personal [illegible] is prima facie evidence of ownership, and unless a lien is reserved in accord with [illegible] the [illegible] possession may convey a good title to a [illegible] purchaser provided he is without notice of any [illegible], [illegible] or claims.

The judgment of the [illegible] court [illegible] and is affirmed.

AFFIRMED.

113 - 24032

WESTERN IRON CONSTRUCTION CO., a corporation,
Appellee,

vs.

S. A. STERNFELD and HARRY N. STERNFELD,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 509

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $176.95 on a trial before the court, and defendants appeal.

The action was for the contract price of 90 angle irons. The defense interposed was that but 39 of the irons were delivered and that 51 remained undelivered. Before trial defendants paid plaintiff for the 39 angle irons delivered, so the controversy is confined to 51 angle irons. Query: Does the evidence support the finding of the trial Judge that these 51 angle irons were delivered? We are of the opinion that it does not.

There is positive evidence that but 39 angle irons were delivered and there is no evidence supporting the contention of plaintiff regarding delivery of the 51. Furthermore, plaintiff's own witness, who is supposed to have delivered them, discredits this contention. This witness was the expressman who carried the angle irons. He testified that he had but 70 pieces on his wagon, some of which he placed near the tool chest in front of the building which defendants were engaged in constructing, and that he would not be sure as to the number. This falls far short of proof of delivery of 90 pieces. Moreover, as no one for defendants received these pieces or checked them up, merely putting them in the street alongside the curb, as testified to by plaintiff's expressman, did not constitute a delivery either express or symbolical.

WESTERN IRON CONSTRUCTION CO., a corporation,
Appellee,

vs.

B. A. STRAWBRIDGE and MARY R. STRAWBRIDGE,
Appellants.

CENTRAL TRIAL MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MOTTOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $176.55 on a trial before the court, and defendants appeal.

The action was for the contract price of 90 angle irons. The defense interposed was that but 59 of the irons were delivered and that 31 remained undelivered. Before trial defendants paid plaintiff for the 59 angle irons delivered, so the controversy is confined to 31 angle irons. Query: Does the evidence support the finding of the trial Judge that these 31 angle irons were delivered? We are of the opinion that it does not.

There is positive evidence that but 59 angle irons were delivered and there is no evidence supporting the contention of plaintiff regarding delivery of the 31. Furthermore, plaintiff's own witness, who is supposed to have delivered them, discredits this contention. This witness was the expressman who carried the angle irons. He testified that he had but 70 pieces on his wagon, some of which he placed near the tool chest in front of the building which defendants were engaged in constructing, and that he could not [illegible] more as to the number. This fact the chart of proof of delivery of 90 pieces. Moreover, as no one for defendants received these pieces or checked them up, merely putting them in the street alongside the curb, as testified to by plaintiff's expressman, did not constitute a delivery either express or symbolical.

Plaintiff's witness, who testified that he checked up 90 angle irons the morning following the expressman's placing of what he thinks was 70 pieces alongside the curb, was evidently mistaken as to the number. On the other hand, the testimony that but 39 of these irons were found in the place where plaintiff had caused its expressman to place the irons is uncontradicted. As to the 51 angle irons plaintiff has failed to establish delivery, and its claim therefore fails.

The judgment of the Municipal Court is reversed with judgment of nil capiat and for costs here and below.

REVERSED WITH JUDGMENT OF
NIL CAPIAT AND FOR COSTS.

Plaintiff's witness, who testified that he checked up 3½ angle irons the morning following the expressman's placing of what he thinks was 75 pieces alongside the curb, was evidently mistaken as to the number. On the other hand, the testimony that only 40 of these irons were found in the place where plaintiff had caused its expressman to place the irons is uncontradicted. As to the 31 angle irons plaintiff has failed to establish delivery, and the claim therefore fails.

The judgment of the municipal court is reversed with judgment of nil capiat [illegible] costs here and below.

[illegible]

[illegible]

163 - 24083

HORACE D. KENNEDY,
Appellee,

vs.

NORTH AVENUE MOTOR SALES COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 510

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment for $75 on a finding of the court, to whom the cause was submitted by agreement of the parties, and defendant appeals.

This is a small case measured by the amount involved, but, notwithstanding plaintiff has failed to appear and defend against the appeal, there is an underlying principle of honesty which this court must recognize.

Plaintiff purchased a motor truck of defendant, paying $75 for it. Defendant represented that the truck was usable and movable. It was neither. The contract was in writing and contained a condition that the truck was "to be running and in usable condition." It seems the truck would not run; that in attempting to start it the engine made much noise but the truck would not move. When plaintiff demanded of defendant a return of the $75 which he paid for the truck he was told that defendant was not interested, that it was not going to give the money back and that "they didn't want the damn thing around."

There is no pretense by defendant that the truck can be run. It is contended that it was sold for "junk." However this may be, it is a sufficient answer to say that such is not the contract. A due regard for common honesty requires that the judgment of the Municipal Court be affirmed, which is accordingly done.

AFFIRMED.

HORACE B. FRENCH,
Appellee,

vs.

NORTH AVENUE MOTOR SALES COMPANY, a corporation,
Appellant.

APPEAL FROM JUSTICE COURT
OF CHICAGO.

APRIL 10, 1916.

MR. JUSTICE HUNTER DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for $75 on a finding of the court, to whom the cause was submitted by agreement of the parties, and defendant appeals.

This is a small case governed by the amount involved, but, notwithstanding plaintiff has failed to appear and defend against the appeal, there is an underlying principle of honesty which this court must recognize.

Plaintiff purchased a motor truck of defendant, paying $75 for it. Defendant represented that the truck was usable and movable. It was neither. The contract was in writing and contained a condition that the truck was "to be running and in usable condition." As a matter of fact the truck did not run; there is not enough to start it in an inch made back. [illegible] but the truck was [illegible]. Now plaintiff demanded of defendant a return of the $75 which he paid for the truck. He was told that defendant was not interested, that [illegible] not going to give the money back unless plaintiff sued for the damn money.

There [illegible] by defendant to [illegible] can be run. It is [illegible] [illegible] for [illegible]. However this may be, it is [illegible] to such time such is not the case. A [illegible] [illegible] recovered that the judgment of the justice court be affirmed, which is accordingly done.

AFFIRMED.

182 - 24103

BLANCHE C. LANE,
Appellee,

vs.

FREDERICK J. LANE,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

211 I.A. 511

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The parties to this cause were married December 24, 1896. The fruit of this union is one child, Francis, whose custody is not now involved, as he is at the present time patriotically serving in the army of his country in its war with Germany. On October 7, 1910, complainant filed her bill for separate maintenance, alleging misconduct on the part of defendant which has compelled her to live separate and apart from him since the 3rd of August, 1908; that defendant has refused to live with his wife, notwithstanding she has at all times been willing to live with him.

An order for $50 solicitor's fees and a payment of $10 a week for the support of the then infant child of the marriage was entered on October 29, 1910.

The defendant answered complainant's bill generally, denying the averments thereof.

It was not until more than eight years after the bill was filed that the cause was tried. In the meantime the parties have lived separate and apart. During most of the time complainant has had the custody of their child, Francis.

Complainant charged in her bill that defendant had been guilty of unkind and cruel conduct toward her,

No. 2815

BLANCHE G. LANE,
Appellee,

vs.

FRANKLIN J. LANE,
Appellant.

APPEAL FROM DOUGLAS COUNTY
COURT OF THE COUNTY.

HON. DISTRICT JUDGE PRESIDING.

The parties to this cause were married December 24, 1892. The fruit of this union is one child, Francis, whose custody is not now involved. He is at the present time patriotically serving in the army of his country in its war with Germany. On October 7, 1918, complainant filed her bill for separate maintenance, alleging misconduct on the part of defendant which has compelled her to live separate and apart from him since the 3rd of August, 1908; that defendant has refused to live with her since, continuing and has at all times been willing to live with him.

An order for $25.00 solicitor's fees and a payment of $10 a week for the support of the minor issue child of the marriage was entered on October 24, 1918.

The defendant answered complainant's bill generally, denying the averments thereof.

It was not until more than eight years after the bill was filed that the cause was tried. In the meantime the parties here lived separate and apart. During most of the time complainant has had the custody of their child, Francis.

Complainant charges in her bill that defendant had been guilty of adultery and cruel conduct towards her,

which she supported by proof. She also testified that defendant had become enamoured of another woman and so told her, and said that he could not continue to live with her as his wife. Defendant left complainant, cut off her account at the grocery, meat market and other stores, shut off the gas and electric light in their apartment and refused to pay rent therefor, and removed himself therefrom. There was also testimony regarding his consorting with other women, sufficient to raise a well grounded inference of immorality.

We think the evidence is such that the chancellor might reasonably find, as he did, that complainant was living separate and apart from defendant without her fault.

Defendant is inconsistent in his defenses. He was principal in a public school and complainant was a teacher in a public school. Notwithstanding the fact that he received $8050 of her earnings as a school teacher, yet he claims that he protested against his wife's teaching school because he wanted her at home to look after the house as a matter of domestic economy and good housekeeping. In the light of these facts his contentions cannot be taken very seriously. Then again, defendant resists the decree for the allowance of separate maintenance on the ground that complainant is self-supporting as a school teacher. At the time of the trial it was established that defendant was principal of the Edward Jenner School and teacher in a night school and that therefrom he was in receipt of an annual income of $4100; that complainant's salary as a school teacher was $1550; that at the time of the trial her health was in a precarious condi-

which she supported by proof. She also testified that defendant had become enamoured of another woman and so told her, and said that he could not continue to live with her as his wife. Defendant left complainant, out of her account at the grocery, most market and other stores, shut off the gas and electric light in their apartment and refused to pay rent therefor, and removed himself therefrom. There was also testimony regarding his consorting with other women, sufficient to raise a well grounded inference of immorality.

We think the evidence in such case the cosmopolitan night reasonably sums, is ample, was complainant was living separate and apart from defendant without her fault.

Reference is made herein to his defense. He was principal in a public school and complainant was a teacher in a public school. Notwithstanding the fact that he received $1000 of her earnings as a school teacher, yet he claims that he protested against his wife's teaching school because he wanted her at home to look after the home as a matter of domestic economy and good housekeeping. In the light of these facts his contentions cannot be taken very seriously. Then again, defendant resists the decree for the allowance of separate maintenance on the ground that complainant is self-supporting as a school teacher. At the time of the trial it was established that defendant was principal of the Edward Tanner School and teacher in a night school and that therefrom he was in receipt of an annual income of $1800; that complainant's salary as a school teacher was $1500; that at the time of the trial her health was in a precarious condi-

tion, her physician testifying that she needed to go to a hospital to undergo a surgical operation; and that her health was impaired at the time of the trial to such an extent that she would not be able to work or teach for some time. The court made complainant an allowance of $65 a month together with $300 necessary expenses of an operation, hospital expenses, doctor's fees, etc., which amount was the estimate of cost made by the medical witness, and also an allowance of $200 for solicitor's fees. The solicitor's fees allowed are, it is conceded, reasonable and no complaint regarding the same is made on this appeal.

There is no evidence in the record in denial of complainant's alleged physical condition and necessities as testified to by herself and her medical adviser. Defendant, however, complains that the nature of her ailment is not made sufficiently specific or certain by the proofs. However this may be, we are of the opinion that the medical witness's statement that her physical condition is such that she must undergo a surgical operation, that she is in a nervous condition and will not be able to work for some time, that the operation will lay her up for from four to six weeks, and the further fact, undenied, that she has no accumulation of money or property with which to support herself during her illness and convalescence, was sufficient to warrant the chancellor in making an allowance of $65 a month. It was proper also to allow $300 as a necessary expense of the surgical operation which it was established by the evidence plaintiff must undergo.

The earnings and income of defendant warranted these allowances. If the condition of complainant and the financial circumstances of defendant should materially change in the future, it will be proper for the chancellor, on appli-

tion, her physician testifying that she needed to go to a hospital to undergo a surgical operation; and that her health was impaired at the time of the trial to such an extent that she would not be able to work or travel for some time. The court made complainant an allowance of $25 a month together with $300 necessary expenses of an operation, hospital expenses, doctor's fees, etc., which amount was the estimate of cost made by the medical witness, and also an allowance of $200 for solicitor's fees. The solicitor's fees allowed are, it is conceded, reasonable and no complaint regarding the same is made on this ground.

There is no evidence in the record [illegible] of complainant's alleged physical condition and necessities as testified to by herself and her medical adviser. Defendant, however, complains that the nature of her ailment is not made sufficiently specific or certain by the proofs. However this may be, we are of the opinion that the medical witness's statement that her physical condition is such that she must undergo a surgical operation, that she is in a nervous condition and will not be able to work for some time, and the operation will lay her up for from four to six weeks, and the further fact, made [illegible], that she has no [illegible] of money or property with which to pay a [illegible] hospital [illegible] and convalescence, was sufficient to warrant the chancellor in making an allowance of $25 a month. It was proper also to allow $300 as a necessary expense of an [illegible] operation which is established by the evidence [illegible] must be terse.

The earnings and income of defendant were [illegible] these allowances. If the [illegible] the financial circumstances of defendant should materially change in the future, it will be proper for the [illegible] on application

cation to him, to vary the allowance which defendant is ordered to pay to such sum as may be warranted by such altered financial condition.

There is no error in procedure discoverable from the record which warrants a reversal of the decree of the Superior Court, and it is therefore affirmed.

AFFIRMED.

ation to him, to vary the allowance which defendant is or-
dered to pay to such sum as may be warranted by such altered
financial condition.

There is no error in proceedure discoverable from
the record which warrants a reversal of the decree of the
Superior Court, and it is therefore affirmed.

AFFIRMED.

224 - 24149

WESTERN HARDWARE MANUFACTURING CO., a corporation, Appellee, vs. H. B. T. CHANDLER and W. I. LINDGREN, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 513

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

There was judgment in the trial court for $155 by confession under a power of attorney contained in a lease under seal between the parties to certain premises in Chicago.

Defendants moved to vacate this judgment, which motion they supported by affidavits, but the motion was denied and this appeal from that order prayed and perfected.

Defendants sought to avoid their liability upon two grounds: First, that the liability was that of a corporation, the Security Tool Works, of which defendants were officers; and, second, that by a parol agreement the lease and possession of the demised premises were surrendered.

The affidavits submitted presented no meritorious defense. The fact, if it is a fact, that the Security Tool Works occupied the premises demised and paid the rent accruing during the time of such occupation in no way affected the lease between the parties. The obligations of the parties under the lease remained unimpaired, notwithstanding the fact may be as alleged.

The lease could not be terminated contrary to its covenants by parol. Even conceding the facts to be as stated in the affidavits supporting the motion, there was no legal surrender of possession of the demised premises and acceptance thereof by plaintiff.

EATON HARDWARE MANUFACTURING CO., a corporation, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
H. E. T. CHANDLER and W. I. LINDEMEN, Appellants.	

SILLA, J.13

MR. JUSTICE MCICK DELIVERED THE OPINION OF THE COURT.

There was judgment in the trial court for $158 by confession under a power of attorney contained in a lease under seal between the parties to certain premises in Chicago.

Defendants moved to vacate this judgment, which motion they supported by affidavits, but the motion was denied and this appeal from that order prayed and perfected.

Defendants sought to avoid their liability upon two grounds: first, that the liability was that of a corporation, the Security Tool Works, of which defendants were officers; and, second, that the parties agreement the lease and possession of the premises for less were surrendered.

The affidavits submitted presented no meritorious defense. The fact, if it is a fact, that the Security Tool Works occupied the premises leased and paid the rent accruing during the time of such occupation in no way affected the lease between the parties. The obligations of the parties under the lease remained unimpaired, notwithstanding the fact may be as alleged.

The lease could not be terminated contrary to its covenants by parol. Even conceding the facts to be as stated in the affidavits supporting the motion, there was no legal surrender of possession of the demised premises and acceptance thereof by plaintiff.

The rule of law is that a sealed executory contract cannot be changed, altered or modified by parol. Becker v. Becker, 250 Ill. 117; Aischuler v. Schiff, 164 ibid 298. This is the rule of the common law which prevails in this jurisdiction. Chapman v. McGraw, 23 Ill. 161; Goldsborough v. Gable, 140 ibid 269.

We cannot say that the trial judge in denying the motion to vacate the judgment abused the discretion which the law reposed in him, there being no facts stated in the affidavits supporting the motion which constituted any defense upon the merits.

The judgment of the Municipal court is affirmed.

AFFIRMED.

The rule of law is that a sealed executory contract cannot be changed, altered or modified by parol. Hooker v. Brooks, 250 Ill. 117; Alexander v. Neiff, 164 Ill. 296. This is the rule of the common law which prevails in this jurisdiction. Thompson v. Morton, 5 Ill. 101; Gelsenbourg v. Hoffe, 140 Ill. 80.

We cannot say that the trial judge in sustaining the motion to vacate the judgment changed the disposition which the law proposed in his, there being no facts stated in the affidavits supporting the motion which constituted a defense upon the merits.

The judgment of the municipal court is affirmed.

AFFIRMED.

231 - 24156

JAMES F. BISHOP, Administrator of the Estate of James Rowe, deceased,

Appellant,

vs.

ROSE H. ROWE,

Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

211 I.A. 514

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The bill in this case seeks to recover from defendant certain personal property which it is averred belongs to the estate of her deceased husband. She defends on the contention that the property claimed was given to her by her husband in his lifetime, that she reduced the same to her possession and that all of it remained in her possession from the time when the same was given to her to the time of her husband's death and was still in her possession on the date the bill was filed.

On hearing the chancellor dismissed the bill for want of equity.

James Rowe, the husband of defendant, died intestate leaving defendant, his widow, and three children, two by his first marriage and one by defendant, his second wife, who are his only heirs at law.

We think it clear that complainant failed to maintain the averments of his bill that the personal property in question was the property of his intestate. It is not controverted that the property claimed by complainant was originally purchased by complainant's intestate with his own money, while on the other hand it is equally clear that the property was bought for and delivered to defendant by deceased.

231 - 24136

JAMES F. BISHOP, Administrator
of the Estate of James Howe,
deceased,

Appellant,

vs.

ROSE H. ROWE,

Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

The bill in this case seeks to recover from defendant certain personal property which it is averred belongs to the estate of her deceased husband. The defendant on the contention that the property claimed was given to her by her husband in his lifetime, that she reduced the same to her possession and that all of it remained in her possession from the time when the same was given to her to the time of her husband's death and was still in her possession on the date the bill was filed.

On hearing the chancellor dismissed the bill for want of equity.

James Howe, the husband of defendant, died intestate leaving defendant, his widow, and three children, two by his first marriage and one by defendant, his second wife, who are his only heirs at law.

We think it clear that complainant failed to maintain the averments of his bill that the personal property in question was the property of his intestate. It is not controverted that the property claimed by complainant was originally purchased by complainant's intestate with his own money. While on the other hand it is equally clear that the property was bought for and delivered to defendant by deceased.

The property about which this controversy mainly centers is certain bonds secured by certain trust deeds upon Chicago real estate, which were purchased by deceased through the real estate firm of Chandler, Hildreth & Co. These purchases were made through a Mr. John D. Wild, a representative of the firm, who was informed by deceased that he bought the bonds for defendant, his wife, and that the same were bought with her money. The deceased gave his money as he earned and received it to his wife, with the understanding that such of it as was not used for family expenses belonged to her, and it was from these savings that deceased bought the bonds now claimed to belong to his estate. It further appeared that the interest on these bonds was during the lifetime of deceased paid to defendant by checks to her order.

Deceased was so cautious regarding evidence of ownership of these bonds by defendant that he consulted Mr. Wild and asked him if there was anything more necessary to be done on his part to make effective such ownership. He then informed Mr. Wild that defendant owned the bonds which he had purchased of Chandler, Hildreth & Co., that the homestead was the only property he had any interest in, and that the title thereto was held in joint tenancy by himself and his wife. Complainant also examined defendant as his witness and her evidence makes it clear that the bonds in question were bought for her by her husband and given to her, that she always had them in her possession and that she received all the interest paid thereon from the time of their purchase to the death of her husband. Other witnesses were produced who corroborated in important particulars the testimony of defendant and Mr. Wild. It also appears that at the time James

The property about which this controversy mainly centers is certain bonds secured by certain trust deeds upon Chicago real estate, which were purchased by deceased through the real estate firm of Chandler, Hildreth & Co. These purchases were made through a Mr. John C. Wild, a representative of the firm, who was informed by deceased that he bought the bonds for defendant, his wife, and that the same were bought with her money. The deceased gave his money as he earned and received it to his wife, with the understanding that such of it as was not used for family expenses belonged to her, and it was from these savings that deceased bought the bonds now claimed to belong to his estate. It further appears that the interest on these bonds was during the lifetime of deceased paid to defendant by checks to her order.

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Rowe was married to defendant he was without property and that all the property which defendant had was accumulated since her marriage and mainly by her thrift.

We think there can be no doubt from the evidence in the record before us that defendant's husband made a gift to her of all the bonds involved in the dispute engendered by the bill, that she always has been the owner and in possession thereof, and that such ownership and possession date from the time when the same were purchased. Furthermore, there is no evidence in this record that the deceased ever treated or dealt with the bonds as his own property, but that on the contrary he purchased them for and delivered them to defendant. Every statement he ever made regarding them supports and verifies the conclusion at which we have arrived as above indicated. Complainant failed to maintain by his proofs the gravamen of his charges in the bill - that defendant wrongfully claims and pretends that the deceased during his lifetime made a gift of said property to her and that she was the owner thereof, and that her claim thereto was false.

It is an elementary principle of law that a gift by a husband to his wife can be sustained without any actual consideration other than that which arises from the relationship existing between them. Love and affection are sufficient considerations to support such a gift. While the reasoning in Clavey v. Schnadt, 272 Ill. 464, supports defendant's contention, yet in this case we find none of the embarrassing features found in that. Here there is no evidence that deceased retained any interest, control or dominion over the bonds bought of Chandler, Hildreth & Co., while in the Clavey case there were acts on the part of the donor which were susceptible of being interpreted as indicating the reten-

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tion of ownership of the property the subject of the gift.

The rights of creditors not intervening, equity will sustain the gift as an executed contract where the possession of the subject of the gift is in the donee. Gill v. Woods, 81 Ill. 64, in which it is said that "Chancellor Kent, speaking as to the effect in equity, lays it down: Gifts from the husband to the wife may be supported as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees. 2 Kent Com. 163."

The decree of the Superior Court being right is affirmed.

AFFIRMED.

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The decree of the Superior Court being right is affirmed.

AFFIRMED.

265 - 24192

MARY R. PIKE, EUGENE S. PIKE, WILLIAM W. PIKE and CHARLES B. PIKE, heirs of Eugene S. Pike, deceased,
Appellants,

vs.

S. ENGLER,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

211 I.A. 520

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause started on a confession of judgment under a warranty of attorney in defendant's lease from plaintiffs' immediate ancestor, which the court, in the exercise of its equitabke powers over such judgments on motion supported by affidavits, opened and let defendant in to plead to the merits. On a trial before court and jury there was a verdict for defendant and a judgment of nil capiat and for costs, and plaintiffs appeal.

The claim is for March and April rent, 1917, for certain space in the Mentor building under a lease from Eugene S. Pike to defendant expiring April 30, 1917. It appears without contradiction that defendant was treasurer of the corporation known as Engler & Burgess and that the corporation was prior to August 14, 1916, occupying the premises leased by defendant, and that said corporation needing more space on the date last mentioned entered into another lease for the premises demised to Engler, with additional space, for the term of five years commencing May 1, 1917, following the expiration of the then existing lease; that by the terms of this new lease it was provided that certain repairs and alterations should be made prior to April 30, 1917. These things were not done as agreed.

MARY P. FIKE, EUGENE S. FIKE,
WILLIAM F. FIKE and CHARLES
H. FIKE, heirs of Eugene S.
Fike, deceased,
Appellants,

vs.

S. INGLER,
Appellee.

APPEAL FROM MARION
COUNTY DE CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause arrived on a confession of judgment under a warranty of attorney in defendant's lease from plaintiff' immediate grantor, which the court, in the exercise of its equitable powers over such judgments on motion supported by affidavits, opened and let defendant in to plead to the merits. On a trial before court and jury there was a verdict for defendant and a judgment of nil capiat and for costs, and plaintiffs appeal.

The claim is for rent and April 1, 1912, for certain space in the outer building under a lease from Eugene S. Fike to defendant expiring April 30, 1912. It appears without contradiction that defendant was transferee of the corporation known as Ingler Furnace and was the corporation was prior to August 1, 1910, occupying the premises leased by defendant, and that the corporation making note space on the date last mentioned entered into another lease for the premises desired to Ingler, with mentioned space, for the term of five years commencing Jan. 1, 1907, providing for expiration of the then existing lease; to. by and terms of this new lease it was provided that certain repairs and alterations should be made prior to April 3, 1907. These things were not done as agreed.

Defendant contends that in reparation for such default plaintiffs by their agent agreed that if defendant would make certain repairs on the demised premises, waive other repairs which plaintiffs contracted to make, and waive default therefor, plaintiffs would allow defendant the last two months rent under the lease of defendant. It is not disputed that the following agreement in writing was made between the parties subsequent to May 1, 1917:

> "If you will eliminate the west door (now known as Door No. 60), when you change the entrance, do the electric wiring, hang six electric fixtures which we have on hand, and two drop lights, wash off and calcimine the walls and ceiling at your expense; we will make all other improvements at our expense and pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916."

Nor is it contested that defendant performed his part of this agreement. However, plaintiffs seriously contend that because no mention is made in this agreement of March and April rent, therefore its payment has not been waived, and further that the agent had no authority to make an agreement to waive the rent.

It is clear from the evidence that defendant had a just claim against the plaintiffs for their non-compliance with the covenant in the lease regarding repairs and alterations, and that such dispute was the subject of settlement between the parties.

Plaintiffs do not seriously contend that the agreement to waive March and April rent was not made, but seek to escape from the effect of the agreement on the ground that it was, if made, not enforcible because the agent who made the agreement had no authority so to do.

If the latter contention be conceded - which it is not - it then remains for us to construe the written agreement.

While it is true that the March and April rent

Defendant contends that in reparation for such default plaintiffs by their agent agreed that if defendant would make certain repairs on the demised premises, waive other repairs which plaintiffs contracted to make, and waive default therefor, plaintiffs would allow defendant the last two months rent under the lease of defendant. It is not disputed that the following agreement in writing was made between the parties subsequent to May 1, 1917:

"If you will eliminate the west door (now known as Door No. 30), when you change the entrance, do the electric wiring, hang six electric fixtures which we have on hand, and two drop lights, wash off and calcimine the walls and ceiling at your expense; we will make all other improvements at our expense and pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916."

Not is it contested that defendant performed his part of this agreement. However, plaintiffs seriously contend that because no mention is made in this agreement of March and April rent, therefore the payment has not been waived, and further that the agent had no authority to make an agreement to waive the rent.

It is clear from the evidence that defendant had a just claim against the plaintiffs for their non-compliance with the covenant in the lease regarding repairs and alterations, and that such dispute was the subject of settlement between the parties.

Plaintiffs do not seriously contend that the agreement to waive March and April rent was not made, but seek to escape from the effect of the agreement on the ground that it was, if made, not enforcible because the agent who made the agreement had no authority so to do.

If the latter contention be conceded - which it is not - it then remains for us to construe the written agreement.

While it is true that the March and April rent

is not specifically mentioned in this writing, still what is meant by the words "pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916," is a matter of construction in the light of all the environing circumstances. At the time this writing was made the rent for March and April was due. Why mention the rent payable under the new lease if there was not something back of it such as the past due rent? It is undoubtedly true that the intention of the parties was clumsily expressed in this writing, but from all the evidence it is clear that the March and April rent was waived in consideration of a release for damages suffered by the default of the landlord in not mkaing repairs within the time agreed in the lease.

In the light of the evidential facts it is not to be doubted that the writing referring to full payment of rent from May 1, 1917, was intended to exclude the liability for the March and April rent, which rent was paid by the waiver of defendant's claim for damages. The rent was therefore paid in virtue of a compromise settlement of the disputes then existing between the parties, which sufficiently appears from the writing in evidence.

Moreover, we are of the opinion that Henry A. Mix, who acted for Eugene S. Pike and whose name was on the Pike office in the building as agent or manager, who had been in the employ of Pike for more than ten years, who personally made the leases on behalf of Pike, and with whom defendant transacted all his business as tenant in the Mentor building, was the agent of Pike clothed with sufficient authority to bind him.

There is no merit in any of plaintiffs' contentions, and the judgment of the Municipal Court is affirmed.

AFFIRMED.

is not specifically mentioned in this writing, still what is meant by the words "pay the full rent from May 1, 1917, as per terms of lease dated August 14, 1916," is a matter of construction in the light of all the surrounding circumstances. At the time this writing was made the rent for March and April was due. Why mention the rent payable under the new lease if there was not something back of it such as the past due rent? It is undoubtedly true that the intention of the parties was clearly expressed in this writing, but from all the evidence it is clear that the March and April rent was waived in consideration of a release for damages suffered by the default of the landlord in not making repairs within the time agreed in the lease.

In the light of the evidence facts it is not to be doubted that the writing referring to full payment of rent from May 1, 1917, was intended to exclude the liability for the March and April rent, which rent was paid by the waiver of defendants claim for damages. The rent was therefore paid in virtue of a compromise settlement of the disputes then existing between the parties, which unfortunately appears from the meager in evidence.

Moreover, we are of the opinion that Henry A. Dix, who acted for Rogers, like and those who on the like office in the building as agent or manager, who had been in the employ of Dix for more than ten years, who personally made the lease on behalf of Dix, and with whom defendant transacted all his business, being in the same for building, was the agent of the plaintiff with full authority to bind him.

There is no merit in any of plaintiffs' contentions, and the judgment of the municipal Court is affirmed.

AFFIRMED.

206 - 24129

ISAAC E. CLASEMAN,
Appellee,

vs.

RICHARD W. FARMER CO.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

211 I.A. 521

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon trial by the court plaintiff had judgment for $35 from which defendant appeals.

The statement of claim set forth that there was due plaintiff the sum of $35, wages for the week ending December 1, 1917; that he had been working as a cutter for the defendant corporation, which agreed to pay him the aforesaid sum weekly for such services. Plaintiff testified that he was employed by Richard W. Farmer, president of defendant, at its place of business, 515 South Fifth avenue, where defendant's name appeared on the door of the premises, and had been paid by checks of the Farmer Co.; that on Wednesday, November 28th, the foreman informed him that he had no further work for him; that he reported for duty on the remaining work days of that week but each time was told that there was nothing further for him to do; that he later made demand on Mr. Farmer for his wages and payment was refused.

Defendant's only witness was the bookkeeper at its place of business 16 West Jackson boulevard. It was sought to show by his testimony that the name of plaintiff did not appear on the books of the company as an employe, but objection to this line of questioning was sustained. He testified that the corporation had no more than one

206 - 24129

ISAAC X. GLASSMAN, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
RICHARD W. TARMER CO., a corporation, Appellant.	

211 I.A. 521

MR. JUSTICE MOSHER DELIVERED THE OPINION OF THE COURT.

Upon trial by the court plaintiff had judgment for $35 from which defendant appeals.

The statement of claim set forth that there was due plaintiff the sum of $35, wages for the week ending December 1, 1917; that he had been working as a cutter for the defendant corporation, which agreed to pay him the aforesaid sum weekly for such services. Plaintiff testified that he was employed by Richard W. Tarmer, president of defendant, at its place of business, 315 South Fifth avenue, where defendant's name appeared on the door of the premises, and had been paid by checks of the Tarmer Co.; that on Wednesday, November 28th, the foreman informed him that he had no further work for him; that he reported for duty on the remaining work days of that week but each time was told that there was nothing further for him to do; that he later made demand on Mr. Tarmer for his wages and payment was refused.

Defendant's only witness was the bookkeeper at its place of business 16 West Jackson boulevard. It was sought to show by his testimony that the name of plaintiff did not appear on the books of the company as an employe, but objection to this line of questioning was sustained. He testified that the corporation had no more than one

place of business in Chicago, and that it was not engaged in business at 515 S. Fifth avenue. To the question if it had a place of business outside of 16 W. Jackson blvd. would he as bookkeeper know of it, objection was also sustained. He further testified that he had drawn Farmer Co. checks payable to plaintiff, but was not permitted to state what the consideration for these checks was.

Defendant's counsel then made offer of proof which he stated would show that the place of business where plaintiff had been employed was not owned, operated or controlled by defendant, but that defendant had a contract with the parties at that address for the manufacture of certain clothing, etc.; that the checks referred to were made out for the use of the owners of such other business and were merely advances on orders placed by the company with such parties, - which offer was refused. Counsel for defendant, claiming to have been taken by surprise, then requested a continuance of 10 or 15 minutes so that he might bring in Mr. Farmer and the foreman of the business on Fifth avenue for the purpose of rebutting the testimony of plaintiff, but the court denied the request.

These rulings on evidence and on the motion for continuance are here complained of as error. The reason given by the court for the denial of a continuance, to the effect that the parties had been waiting all morning for trial and that it was counsel's place to have his witnesses in court and ready for hearing, was, we think, sound and the ruling entirely proper. While some of the evidence offered and refused may have been admissible, its rejection amounted to no more than harmless error. Statements by the bookkeeper as to working arrangements between

place of business in Chicago, and that it was not engaged in business at 315 S. Fifth avenue. To the question if it had a place of business outside of 16 W. Jackson blvd. would he as bookkeeper know of it, objection was also sustained. He further testified that he had drawn farmer's checks payable to plaintiff, but was not permitted to state what the consideration for these checks was.

Defendant's counsel then made offer of proof which he stated would show that the place of business where plaintiff had been employed was not owned, operated or controlled by defendant, but that defendant had a contract with the parties at that address for the manufacture of certain clothing, etc.; that the checks referred to were made out for the use of the owners of such other business and were merely advances on orders issued by the company with such parties. - which offer was refused. Counsel for defendant, claiming to have been taken by surprise, then requested a continuance of 1 or 15 minutes so that he might send in Mr. Porter and the foreman of the business on Fifth avenue for the purpose of rebutting the testimony of plaintiff, but the court denied the request.

These rulings on evidence and on the motion for continuance are here complained of as error. The reason given by the court for the denial of a continuance, to the effect that the parties had been waiting all morning for trial and that it was counsel's duty to have his witnesses in court and ready for hearing, was, we think, sound and the ruling entirely proper. While some of the evidence offered and refused may have been admissible, its rejection amounted to no more than harmless error. Statements by the bookkeeper as to working arrangements between

the Farmer Co. and the establishment where plaintiff had worked, even if admitted could not be weighed against the uncontradicted statement of plaintiff that he had been employed by Farmer, as head of the defendant corporation, who had agreed to pay him the sum claimed per week, and that he had actually been paid by checks drawn against the account of defendant.

We hold that the judgment was right and it is affirmed.

AFFIRMED.

the Barnet Co. and the establishment where plaintiff had worked, even if admitted would not be weighed against the uncontradicted statement of plaintiff that he had been employed by Barnet, as head of the defendant corporation, who had agreed to pay him the sum claimed per week, and that he had actually been paid by checks drawn against the account of defendant.

We hold that the judgment was right and it is affirmed.

AFFIRMED.

235 - 24160

MRS. W. N. MANNING, Appellee, vs. THE TOBEY FURNITURE CO., a corporation, Appellant.	Appeal from Municipal Court of Chicago.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court in favor of plaintiff, had upon a jury trial of a fourth class action.

The abstract here filed in referring to the result of the hearing simply notes the following: "Verdict of jury. * * Judgment on the verdict." What the nature of the verdict and judgment was is not shown, and could be determined by us only through an examination of the record. As has been repeatedly held, we will not search the record to discover grounds for reversal. DeLong v. Hruby, 203 Ill. App. 206; People v. Shapiro, ibid. 292; Barber v. Mellish-Hayward Co., No. 23468 this court, opinion filed January 28, 1918, and cases there cited.

For the failure of defendant to present properly his appeal the judgment of the Municipal Court is affirmed.

AFFIRMED.

MRS. W. K. MANNING, Appellee,	
va.	Appeal from
THE KOBEY FURNITURE CO., a corporation, Appellant.	Municipal Court of Chicago.

MR. JUSTICE MOSNELLY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court in favor of plaintiff, had upon a jury trial of a fourth class action.

The abstract here filed in referring to the result of the hearing simply notes the following: "Verdict of jury. * * Judgment on the verdict." What the nature of the verdict and judgment was is not shown, and could be determined by us only through an examination of the record. As has been repeatedly held, we will not search the record to discover grounds for reversal. Delong v. Hruby, 203 Ill. App. 303; People v. Shapiro, ibid. 293; Barber v. Mellish-Harvard Co., No. 23468 this court, opinion filed January 28, 1918, and cases there cited.

For the failure of defendant to present properly his appeal the judgment of the Municipal Court is affirmed.

AFFIRMED.

323 - 24250

FRANK W. STEWART,
Appellee,

vs.

L. WILSON et al.

WILLIAM W. LINK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff having brought suit in replevin for a quantity of tire holders, upon trial had judgment from which defendant appeals.

Plaintiff was in the automobile supply business, and tire holders seem to be small metal devices for holding extra tires on automobiles, and were manufactured by a Mr. L. Wilson. Plaintiff made a contract with Wilson for a supply of the tire holders. Part of the process of manufacturing was enameling, and this was done by the defendant Link under an arrangement between him and Wilson. The holders taken under the replevin writ were in the possession of Link; some of them he had enameled and claimed a lien for the amount of his labor upon these. The court found that he was entitled to this, and the amount was afterwards paid into court by the plaintiff. The propriety of this is not questioned. Defendant, however, claimed that he was entitled to possession not only of these holders but some 900 more, all of which he claimed were held by him to secure a general indebtedness due him from Wilson not connected with the contract between Stewart and Wilson. That the tire holders were so pledged is not in dispute, but Link's right thereto depends upon Wilson's title, for if Stewart and not Wilson owned the articles Wilson's pledge

FRANK A. [illegible],
Appellee,

vs.

L. WILSON et al.

WILLIAM W. [illegible],
Appellant.

Appeal from [illegible] COURT
OF [illegible].

[illegible]. JUSTICE MCDONALD delivered the opinion of the court.

Plaintiff [illegible] sued in replevin for a quantity of [illegible] tires, [illegible] for which defendant appeals.

Plaintiff [illegible] and tire dealers [illegible] exide tires [illegible] I. Wilson. Plaintiff made [illegible] supply of the tire [illegible]. [illegible] of the process [illegible] ing was one [illegible], and this [illegible] by the [illegible] link under an arrangement between [illegible] and Wilson. [illegible] under the replevin writ were in the possession of [illegible]; some of them he had [illegible] and claimed a lien for the [illegible] of his labor upon them. The court found that [illegible] to this, and the record was [illegible] in [illegible] the plaintiff. The propriety of this is not questioned. [illegible] ent, however, claims that he was [illegible] only of [illegible] but [illegible], [illegible] claimed were [illegible] a [illegible] him from [illegible] not [illegible] and [illegible]. [illegible] dispute, but [illegible] for if [illegible] was not [illegible] [illegible]

of these to Link would be futile. The controversy therefore narrows to the question as to whether under the facts, which do not seem to be substantially in dispute, the tire holders in question belonged to Stewart or Wilson.

The original contract between Stewart and Wilson is evidenced by writing dated October 17, 1916, which is a simple agreement for the purchase by Stewart of rear tire holders for Ford cars as per sample. Under this contract Wilson was to furnish both the steel and labor necessary. It seems that Wilson had little capital, and Stewart for a time advanced money to him to buy material and for labor and other expenses. In December, by mutual agreement and for sufficient reasons, the contract was changed so that Stewart ceased furnishing money to Wilson to buy steel and bought the steel himself and had it shipped to Wilson to be made up into tire holders. In order to keep track of the matter Stewart charged the price paid for the steel to Wilson and credited against this the full amount he had agreed to pay Wilson per holder. Wilson never kept any account in which he credited Stewart for moneys advanced for any of the steel. We have considered the correspondence and the verbal testimony of both Stewart and Wilson, and are of the opinion that the court was correct in concluding that the steel belonged to Stewart. Defendant's counsel seeks to draw a contrary conclusion from Stewart's method of bookkeeping. This, however, is not conclusive against him. It was desirable for Stewart to keep an account of the amount of steel which he sent to Wilson, and it would seem to be the proper thing that entries of this should be made in Wilson's account. Statements were made by both parties tending to show that in their opinion the steel was Stewart's and not Wilson's. Wilson

of these to link would be futile. The questioner therefore narrows to the question as to whether under the facts, which do not seem to be substantially in dispute, the tire holders in question belonged to Stewart or Wilson.

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specifically admitted this, saying at one time to Stewart, "You can sell your steel for more than you paid for it." Wilson testifies in substance that when Stewart had suggested that he was getting too much money involved he, Wilson, had advised him to continue for the reason that the steel Stewart had bought had increased in value and that Stewart could sell it at any time at a profit. Other similar statements appear in the record, all of which lead inevitably to the conclusion that both Stewart and Wilson treated the steel as belonging to Stewart. We do not think there is anything in the letter of December 19, 1916, written by Stewart to Wilson inconsistent with this position. It was simply a caution to Wilson not to have Stewart buy more steel than was actually required, and a warning that if Wilson should have Stewart buy more than was necessary for the manufacture of the tire holders Wilson would be charged with this excess.

We cannot consider as changing the relations of the parties what was said by Wilson after they arrived at the stage of disagreement; we must adopt the construction placed upon their contract while the parties were in agreement and working in accord.

The fact that the steel had been made into tire holders under the contract does not deprive plaintiff of his right of possession. Among the cases so holding, upon facts essentially similar to those in the instant case, are First National Bank of Elgin v. Schween, 127 Ill. 573; McCrory v. Hamilton, 39 Ill. App. 490; Lonergan v. Stewart, 55 Ill. 44.

If as between Stewart and Wilson, Stewart owned these articles, it follows that Wilson could make no pledge of them to Link to secure his indebtedness. This is in accordance

specifically admitted this, saying at one time to Stewart, "You can sell your steel for more than you paid for it." Wilson testifies in substance that when Stewart had suggested that he was getting too much money involved he, Wilson, had advised him to continue for the reason that the steel Stewart had bought had increased in value and that Stewart could sell it at any time at a profit. Other similar statements appear in the record, all of which lead inevitably to the conclusion that both Stewart and Wilson treated the steel as belonging to Stewart. We do not think there is anything in the letter of December 14, 1916, written by Stewart to Wilson inconsistent with this position. It was simply a caution to Wilson not to have Stewart buy more steel than was actually required, and a warning that if Wilson should have Stewart buy more than was necessary for the manufacture of the tire molders Wilson would be charged with this excess.

We cannot consider as charging the relations of the parties what was said by Wilson after they arrived at the stage of disagreement; we must adopt the construction placed upon their contract while the parties were in harmony and working in accord.

The fact that the steel had been made into tire molders under the contract does not deprive plaintiff of his right of possession. Among the cases so holding, upon facts essentially similar to those in the instant case, we find First National Bank of Elgin v. Schneider, 107 Ill. 170; McCoy v. Hamilton, 49 Ill. App. 49; Lowenstein v. Lowry, 30 Ill. App. 46.

If as between Stewart and Wilson, Stewart owned these articles, it follows that Wilson could not, by judge of them to link to secure him in notoriety. His act in conferring

with the holding in First National Bank of Elgin v. Schween, 127 Ill. 573; Burton v. Curven, 40 Ill. 320; Montgomery Ward & Co. v. American Trust & Savings Bank, 71 Ill. App. 20; Ashland Block Association v. Thompson Co., 94 Ill. App. 501.

Holding as we do that under the facts Stewart was the owner of the articles replevied, and applying the law as stated in the cases cited, we are of the opinion that the judgment of the trial court was right and it is affirmed.

AFFIRMED.

with the holding in First National Bank of Elgin v. Bowman, 127 Ill. 672; Hurlbut v. Curtiss, 40 Ill. 320; Montgomery Ward & Co. v. American Trust & Savings Bank, 72 Ill. App. 20; Ashland Block Association v. Thompson Co., 34 Ill. App. 501.

Holding as we do that under the facts stated, was the owner of the articles replevied, and applying the law as stated in the cases cited, we are of the opinion that the judgment of the trial court was right and is affirmed.

AFFIRMED.

419 - 23764

7282

EDWARD GIRDZUS, a minor, by John Girdzus, his next friend, Appellee, vs. SIMON VAN ETTEN, HENRY VAN ETTEN and CATHOLIC BISHOP OF CHICAGO, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

211 I.A. 533

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

We have this day filed an opinion in the case of Edward Girdzus, a minor, by John Girdzus, his next friend, v. Simon Van Etten, Henry Van Etten and Catholic Bishop of Chicago, General No. 23598, and what we have there said is controlling here. For the reasons there given, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

No. 3.

EDWARD GINGRICH, a minor, by John Gingrich, his next friend,

Appellee,

vs.

SIMON VAN ALLEN, ROYAL VAN ALLEN and LATHONIA MIGHT & CO. MILLS,

Appellants.

CIRCUIT COURT,

MARION COUNTY.

FILED, 1893

MR. JUSTICE MORRIS delivered the opinion of the court.

We have this day filed an opinion in the case of Edward Gingrich, a minor, by John Gingrich, his next friend, v. Simon Van Allen, Royal Van Allen and Lathonia Might et al., Appellants, Marion C. 3293. As what is here there only is controlling here. On the opinion filed, the judgment of the Circuit Court of Marion County is affirmed.

Affirmed.

4284

564 - 23909

FRANK LOPATA,
Appellee,

vs.

JOHN JAROS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 546

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Frank Lopata brought suit in the Municipal Court of Chicago against John Jaros, to recover $480.86, alleged to be due for goods sold and delivered. Plaintiff's statement of claim set forth in detail a running account with defendant, commencing August 20, 1915, and continuing until May 1, 1916, and showing a balance of $480.86 due from defendant to plaintiff. Defendant did not deny the correctness of any of the items, but filed an affidavit of merits alleging that on June 10, 1916, he and plaintiff had a settlement of all claims between them; that he paid plaintiff $325 in cash, and that this, together with a credit of $130 which plaintiff allowed him, was settlement in full. The case was tried before the court without a jury, and a finding and judgment was entered in favor of plaintiff for the amount of his claim.

The only question raised on this appeal is the sufficiency of the evidence to support the judgment in favor of plaintiff. Defendant contends that the judgment should be reversed because the finding of the trial court is against the weight of the evidence.

544 - 23000

FRANK LOPATA,

Appellee,

vs.

JOHN JANOS,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

PILLA. 546

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Frank Lopata brought suit in the municipal court of Chicago against John Janos, to recover $480.00, alleged to be due for goods sold and delivered. Plaintiff's statement of claim set forth in detail a running account with defendant, commencing August 20, 1915, and continuing until May 1, 1916, and showing a balance of $480.00 due from defendant to plaintiff. Defendant did not deny the correctness of any of the items, but filed an affidavit of merits alleging that on June 16, 1916, he and plaintiff had a settlement of all claims between them; that he paid plaintiff $330 in cash, and in a note, together with a credit of $150 which plaintiff allowed him, was settlement in full. The case was tried before the court without a jury, and a finding and judgment was entered in favor of plaintiff for the amount of his claim.

The only question raised on this appeal is the sufficiency of the evidence to support the judgment in favor of plaintiff. Defendant contends that the judgment should be reversed because the finding of the trial court is against the weight of the evidence.

The defendant having failed to dispute the correctness of plaintiff's claim, assumed the burden of proving payment. He testified that he met plaintiff on Saturday afternoon, between twelve and one o'clock, June 10, 1916, in a certain saloon in Chicago, and there paid him $325 in cash; that plaintiff allowed him a credit for labor and material furnished; that he cashed a check on the day in question at the Lawndale State Bank for $1,500, and had this amount of money with him when he paid plaintiff; that it was his pay day and he was paying off his men; that his pay roll on that day was $800; that he asked plaintiff for a receipt and plaintiff promised to mail him one, but stated: "You got enough witness if I don't mail you receipt." Defendant's story was corroborated by three other witnesses, who testified they were present and witnessed the alleged settlement. All of defendant's witnesses testified positively that the transaction took place on the afternoon of June 10, 1916.

Plaintiff testified that he was not in the saloon in question on June 10, 1916; that he went to Gary, Illinois, on that date; that he left Chicago about eleven o'clock in the morning and reached Gary about seven o'clock in the evening. In this plaintiff was corroborated by two other witnesses, who testified that they accompanied plaintiff to Gary, Illinois, on the day in question; that they left Chicago about 11:30 in the morning and arrived at Gary in the evening. An employee of the Lawndale State Bank testified on behalf of the plaintiff that the books of the bank did not show any check cashed by defendant on the date in question.

The defendant having failed to dispute the correctness of plaintiff's claim, assumed the burden of proving payment. He testified that he met plaintiff on Saturday afternoon, between twelve and one o'clock, June 16, 1916, in a certain saloon in Chicago, and there paid him $350 in cash; that plaintiff allowed him a credit for labor and material furnished; that he cashed a check on the day in question at the Lawndale State Bank for $1,300, and had this amount of money with him when he paid plaintiff; that it was his pay day and he was paying off his men; that his pay roll on that day was $800; that he asked plaintiff for a receipt and plaintiff promised to mail him one, but stated: "You got enough witness if I don't mail you a receipt." Defendant's story was corroborated by three other witnesses, who testified they were present and witnessed the alleged settlement. All of defendant's witnesses testified positively that the transaction took place on the afternoon of June 16, 1916.

Plaintiff testified that he was not in the saloon in question on June 16, 1916; that he went to Gary, Illinois, on that date; that he left Chicago about eleven o'clock in the morning and reached Gary about seven o'clock in the evening. In this plaintiff was corroborated by two other witnesses, who testified that they accompanied plaintiff to Gary, Illinois, on the day in question; that they left Chicago about 11:30 in the morning and arrived at Gary in the evening. An employee of the Lawndale State Bank testified on the day in question; that they left Chicago about

It is apparent from the foregoing statement of the evidence that the determination of the question here involved was peculiarly within the province of the trial court, who saw and heard the witnesses and was in a much better position to judge of their credibility than we are, and after a careful review of the record, we cannot say that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

It is apparent from the foregoing statements of the evidence that the self-exclusion of the one tion here involved was voluntarily within the province of the trial court, who can see and hear the witnesses and are in a much better position to judge of their credibility than we are, and after a careful review of the records, we cannot say that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the [illegible] court [illegible] is affirmed.

AFFIRMED.

4285

- 24382

CALISTA PIERCE,
Appellee,

vs.

EUGENE C. PIERCE, et al.
Appellants.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

211 I.A. 547

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Calista Pierce filed her bill of complaint, March 12, 1918, in the Superior Court of Cook County, against Eugene G. Pierce, Mary P. Goodison, George Allan Goodison, her husband, George B. Williams and Charles Hudson, seeking to set aside an oral contract for the transfer of personal property, entered into between the complainant and the defendants Eugene G. Pierce and others, and praying for a temporary injunction to prevent the defendants from transferring, assigning, encumbering, or disposing of shares of stock in a certain corporation, and from receiving dividends thereon, and that a receiver be appointed to take and hold the certificates of stock pending a hearing. On the same day an order was entered awarding a writ of injunction as prayed for. The writ was served on the next day, March 13th, and an order was entered appointing a receiver of the certificates of stock, and defendants were ordered to forthwith turn them over to such receiver until the further order of court. From this order, the defendants Pierce and Williams prosecute

DALIETA PIERCE,

Appellee,

vs.

EUGENE G. PIERCE, et al,

Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Dalieta Pierce filed her bill of complaint, March 12, 1918, in the Superior Court of Cook County, against Eugene G. Pierce, Mary F. Goodison, George Allan Goodison, her husband, George E. Williams and Charles Hudson, seeking to set aside an oral contract for the transfer of personal property, entered into between the complainant and the defendants Eugene G. Pierce and others, and praying for a temporary injunction to prevent the defendants from transferring, assigning, encumbering, or disposing of shares of stock in a certain corporation, and from receiving dividends thereon, and that a receiver be appointed to take and hold the certificates of stock pending a hearing. On the same day an order was entered awarding a writ of injunction as prayed for. The writ was served on the next day, March 13th, and an order was entered appointing a receiver of the certificates of stock, and defendants were ordered to forthwith turn them over to such receiver until the further order of court. From this order, the defendants Pierce and Williams prosecute

this appeal.

Complaint is made that the appointment of the receiver was contrary to the rules of the Superior Court, which provide that where no attorney or solicitor has appeared of record, notice shall be given to the opposite party at least twenty-four hours before the motion is heard, and that copies of all papers must be served with the notice; that all motions shall be in writing; and it is argued that none of these requirements was observed in the instant case; that one of the appellant defendants was served but ten minutes before the motion was heard, and that notice was claimed to have been served on the defendant Hudson by leaving a copy of his notice at his office after four o'clock on the evening of the day before the motion was heard.

The record discloses that appellants were represented by counsel on the hearing of the motion for the appointment of a receiver; that counsel entered what they term a special appearance for the sole purpose of resisting the appointment of the receiver. The rules of the Superior Court, in addition to what has been stated, provide that where a motion is made before default day and the defendants have not appeared personally or by attorney, the defendants shall be personally served at least one day before the motion is made, if it is practicable to do so and not otherwise determined by the court because of emergency. Appellants were represented by counsel before the chancellor on the application for the appointment of a receiver, and while twenty-four hours notice had not been given, yet we think, under the rules, the court was fully warranted

this appeal.

Complaint is made that the appointment of the receiver was contrary to the rules of the Superior Court, which provide that where no attorney or solicitor has appeared of record, notice shall be given to the opposite party at least twenty-four hours before the motion is heard, and that copies of all papers must be served with the motion; that all motions shall be in writing; and it is argued that none of these requirements was observed in the instant case; that one of the appellant defendants was served but ten minutes before the motion was heard, and that notice was claimed to have been served on the defendant Hudson by leaving a copy of his notice at his office after four o'clock on the evening of the day before the motion was heard.

The record discloses that appellants were represented by counsel on the hearing of the motion for the appointment of a receiver; that counsel entered that they were a special appearance for the sole purpose of resisting the appointment of the receiver. The rules of the Superior Court, in addition to what has been stated, provide that where a motion is made before default day and the defendants have not appeared personally or by attorney, the defendants shall be personally served at least one day before the motion is made. If it is practicable to do so and not otherwise determined by the court because of emergency. Appellants were represented by counsel before the chancellor on the application for the appointment of a receiver, and while twenty-four hours notice had not been given, yet we think, under the rules, the court was fully warranted

in holding the notice sufficient, for in matters of emergency the rule dispenses with notice, and we do not understand, as counsel for appellants argue, that in such case there must be a finding of record by the trial judge to that effect.

It is also contended that there is no equity in the bill. No complaint is made of the awarding of the injunction writ, whereby the defendants were restrained from transferring or encumbering the stock involved, and in fact appellants argue that under the circumstances this afforded sufficient protection without the appointment of the receiver; and in this connection it is stated that the defendants enjoined are responsible persons, and that "it is not to be presumed that responsible or even reputable parties are going to violate an injunction served on them." This argument assumes that the injunction was properly awarded, and therefore further assumes the sufficiency of the bill. In any event, we think the bill is sufficient. It alleges in substance that complainant inherited the business from her deceased husband, which she afterwards incorporated; that she transferred the certificates of stock to certain of the defendants in consideration of their oral promise to allow complainant sufficient money to support herself during her life; that such defendants further agreed not to transfer any of the stock during her lifetime; that in violation of this agreement the defendant Pierce transferred some of the stock and threatened to transfer more of it, and refused complainant the support promised, although demanded by her. These allegations, we think, made a prima facie case. From what we have said, it follows that the contention of appellants that there was

in holding the notice sufficient, for in matters of emergency the rule dispenses with notice, and we do not understand, as counsel for appellants argue, that in such case there must be a finding of record by the trial judge to that effect.

It is also contended that there is no equity in the bill. No complaint is made of the awarding of the injunction writ, whereby the defendants were restrained from transferring or encumbering the stock involved, and in fact appellants argue that under the circumstances this afforded sufficient protection without the appointment of the receiver; and in this connection it is stated that the defendants enjoined are responsible persons, and that "it is not to be presumed that responsible or even respectable parties are going to violate an injunction served on them." This argument assumes that the injunction was properly awarded, and therefore further assumes the sufficiency of the bill. At any event, we think the bill is sufficient. It alleges in substance that complainant inherited the Dunn is from her deceased husband, which she afterwards incorporated; that she transferred the certificates of stock to certain of the defendants in consideration of their oral promise to allow complainant sufficient money to support herself during her life, and that defendants further agreed not to transfer any of the stock during her lifetime; that in violation of this agreement the defendants have forced transfers some of the stock and threatened to transfer more of it, and refused complainant the support promised, although demanded by her. These allegations, we think, made a prima facie case. From what we have said, it follows that the consideration of appellants that there was

no breach alleged is without merit.

It is also contended that the order appointing a receiver is improper, for the reason that the corporation was not made a party defendant. The stockholders and officers are made defendants. The receiver was not authorized to take possession of any of the corporate property, but only to hold the certificate of stock. A corporation is in no way interested as to what individuals hold the stock, and we think it was, therefore, unnecessary to join it as a party. Moreover, if it should develop on the hearing that the corporation were a necessary party, the proper amendment might be made.

The receiver in this case is more in the nature of a custodian. The only power given him is to receive the certificates of stock and hold the same until the further order of court. The only purpose of this is to render the injunction effective to maintain the status quo. In these circumstances, we think the appointment of the receiver was warranted. West Side Hospital v. Steele, 124 Ill. App. 534.

The order of the Superior Court of Cook County is affirmed.

AFFIRMED.

no breach alleged is without merit.

It is also contended that the order appointing a receiver is improper, for the reason that the corporation was not guilty of any default. The stockholders and officers are made defendants. The receiver was not authorized to take possession of any of the corporate property, but only to hold the certificate of stock. A corporation is in no way interested as to what individuals hold the stock, and we think it was, therefore, unnecessary to join it as a party. Moreover, if it should develop on the hearing that the corporation were a necessary party, the proper amendment might be made.

The receiver in this case is sure in the nature of a sequestrator. The only power given him is to receive the certificates of stock and hold the same until the further order of court. The only purpose of this is to render the injunction effective to maintain the status quo. In these circumstances, we think the appointment of the receiver was warranted. Ward Milk Co. v. Hirsch, 124 App. Div. 324.

The order of the Supreme Court of York County is affirmed.

AFFIRMED.

245 - 23590

STRESENREUTER BROTHERS,
a corporation,
Appellee,

vs.

HENRY A. KNOTT,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 556

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendant, Henry A. Knott, having given the plaintiff a promissory note in the sum of $1754.25 as the final payment for remodeling a building owned by the defendant, the plaintiff brought suit and recovered a verdict and judgment in the sum of $1996.91. This appeal is taken therefrom.

On July 16, 1914, the plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to "furnish all the material and labor necessary for the masonry and carpentry for alterations and additions to building at the corner of Lake and Jefferson streets, Chicago, for said owner as shown on plans and described in the specifications * * * and to do to the satisfaction of the architects everything required of him by the specifications or drawings." Plaintiff, at the same time, had a contract for the erection and construction of a new two-story building which was to be built immediately west of the building to be remodeled, which latter was located at the northwest corner of Lake and Jefferson streets. The contract

246 - 25590

STRUCKMANNTEN BROTHERS,
a corporation,
Appellee,

vs.

HENRY A. BROTT,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The defendant, Henry A. Brott, having given the plaintiff a promissory note in the sum of $1756.05 as the final payment for remodeling a building owned by the defendant, the plaintiff brought suit and recovered a verdict and judgment in the sum of $1755.05. This appeal is taken therefrom.

On July 16, 1914, the plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to "furnish all the material and labor necessary for the masonry and carpentry for alterations and additions to building at the corner of Lake and Jefferson streets, Chicago, for said owner as shown on plans and described in the specifications * * * and to do to the satisfaction of the architects everything required of him by the specifications or drawings."

Plaintiff, at the same time, had a contract for the erection and construction of a new two-story building which was to be built immediately west of the building to be remodeled, which latter was located at the northwest corner of Lake and Jefferson streets. The contract

provides for the alterations and remodeling of the old building for $16,729.00, payable "only upon certificates issued by the architects", etc. It was provided in Article 4 of the contract that "the specifications and drawings with all notations now thereon are, together with the agreement, the documents forming the contract * * * that said owner and contractor * * * agree that they will abide by and promptly and fully carry out all decisions of the architects given thereunder." The specifications for carpenter work provided (56), "The contractor should wreck the floors of the old building and remove all the material of same from the premises, after which the new floor construction will be put in place as shown on the drawings."

After the alterations were made and the work of remodeling completed by the plaintiff; and after the last architect's certificate had been issued and paid for, in part, by the note in question, it is claimed by the defendant, the owner, that he discovered, for the first time, that the height of the second story averaged 5/8 of an inch and the height of the third story, 2-5/8 of an inch less than called for by the plans. The defendant then refused to pay the note in question and claims, in his affidavit of merits, "that by reason of the failure on the part of the plaintiff to perform and live up to its agreement, defendant has lost large sums of rent; * * * that by reason of the failure of the plaintiff to perform its work in accordance with the plans and specifications, said building was permanently damaged * * * in the sum of , to wit, ten thousand dollars."

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After the alterations were made and the work of remodeling completed by the plaintiff; and after the last architect's certificate had been issued and paid for, in part, by the note in question, it is claimed by the defendant, the owner, that he discovered, for the first time, that the height of the second story averaged 6\8 of an inch and the height of the third story, 2-3\8 of an inch less than called for by the plans. The defendant then refused to pay the note in question and claims, in his affidavit of merits, "that by reason of the failure on the part of the plaintiff to perform and live up to its agreement, defendant has lost large sums of rent; * * * that by reason of the failure of the plaintiff to perform its work in accordance with the plans and specifications, said building was permanently damaged * * * in the sum of , to wit, ten thousand dollars."

The evidence shows that the new building was all complete before work was begun altering and remodeling the old building; that the new building was constructed according to measurements given on the plans, and after the first story was finished it was found that the defendant's architects had made a mistake and that the second floor of the new building was approximately 18 inches higher than the second floor of the old building. Just how the architect's mistake occurred is not shown. As the result of that error, changes had to be made in the alterations of the old building. Those changes were agreed to by both plaintiff and the defendant, but the latter through his architect. It was agreed orally that the floors of the old building should be raised. Those changes were looked after, as far as the defendant was concerned, by one Dwight, the superintendent for the architects, Postle and Fischer. Dwight, as the architect Postle testified, looked after the details daily; and, referring to the floor changes arising from the mistake in the original plans, was supposed to look after them. The building itself is what is called a loft building, "just rough brick walls used for manufacturing purposes and all there is inside is joists overhead and no lath or plaster at all."

The space between the floor and ceiling of the new building was the same as was called for by the plans. In order to have the openings in the various floors of the old building as they should have been after the discrepancy in the foundation was discovered, it was necessary, in the language of the architect "to raise the whole business that much above the second floor." It is the theory of the plaintiff that after the mistake was discovered in the original plans, the second floor of the old building was

The evidence shows that the new building was all complete before work was begun altering and remodeling the old building; that the new building was constructed according to measurements given on the plans, and after the first story was finished it was found that the defendant's architects had made a mistake and that the second floor of the new building was approximately 18 inches higher than the second floor of the old building. Just how the architect's mistake occurred is not shown. As the result of that error, changes had to be made in the alterations of the old building. Those changes were agreed to by both plaintiff and the defendant, but the latter through his architect. It was agreed orally that the floors of the old building should be raised. Those changes were looked after, so far as the defendant was concerned, by one Dwight, the superintendent for the architects, Poatle and Wisdom. Dwight, as the architect Poatle testified, looked after the details daily; and, referring to the floor changes arising from the mistake in the original plans, was supposed to look after them. The building itself is what is called a loft building, "just rough brick walls used for manufacturing purposes and all there is inside is joists overhead and no lath or plaster at all."

The space between the floor and ceiling of the new building was the same as was called for by the plans. In order to have the openings in the various floors of the old building as they should have been after the alteration, a cheapency in the foundation was discovered, it was necessary, in the language of the architect "to raise the whole business that much above the second floor." It is the theory of the plaintiff that after the mistake was discovered in the original plans, the second floor of the old building was

18 inches below the second floor of the new building; that the architects' office was told about it; that the matter was talked over; that the plans, from time to time, were changed, owing to that original error made in the defendant's architects office; that not only did the second and third floors of the old building have to be raised, but the windows on the second and third floors also; that after they put in the third floor and it was found that the height from the floor to the roof was 18 inches less than the plans called for, it, the plaintiff, was given an order to put the additional brick work on the fourth floor; that the changes were made at the suggestion of and sanctioned by the defendant through his architect.

It is the theory of the defendant that, although admittedly an error was made in the plans in regard to the height of the floors in the old building, and as a result it became necessary to make certain changes in the alterations and remodeling of the old building not provided for in the original plans, yet it was the obligation of the plaintiff, as to the height of the space in each story, to follow the plans, and, although the defendant, through his architect, undertook to authorize certain changes to be made in the construction, and, as the original contract provided that "except when authorized in writing by the architect, the superintendent has no authority to add or deduct from the work called for under the contract or to order any changes therein", the defendant, having given no authority in writing as to changes in height of ceilings, was not bound thereby. The defendant lays much stress upon the provision that the authority for alterations must be in writing. The

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evidence shows, however, that, owing to the defendant's architects' error in the original plans, it became necessary to depart radically from the original plans themselves. Apparently no new plans were drawn; but the alterations and the remodeling went on as far as the elevation of the floors was concerned, and went on by reason of mutual oral understanding, and without complying with the provision in the contract that authority for alterations should be in writing. Under the circumstances we feel bound to assume that the parties, by their conduct, waived the necessity for written authority to make changes, and that the trial judge erred in excluding, as he did from time to time, evidence which was offered by the plaintiff to show that what was done as to changes, occurred with the definite sanction of the proper representative of the defendant. As to the difference in the height of the ceilings, it may be material or immaterial. There is testimony each way. Certainly an average discrepancy of 5/8 of an inch in the height of the second story must be considered, under the circumstances, negligible. Of course, the 2-5/8 inches in the third story is more substantial. The whole matter, however, was left to the jury and they have decided against the defendant. Counsel for the defendant complains of the refusal to give certain instructions. We have examined them and are of the opinion that it was not prejudicial error to refuse them.

It is also claimed by counsel for the defendant that the matter of damages should have been submitted to the architects for determination before suit was brought. We cannot agree thereto. The plaintiff simply brought suit upon a note which had been voluntarily given him by the defendant. That suit, he was entitled to begin and he made

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It is also claimed by counsel for the defendant that the matter of damages should have been submitted to the architects for determination before suit was brought. We cannot agree thereto. The plaintiff simply brought suit upon note which had been voluntarily given him by the de-

out a *prima facie* case by simply introducing the note. The whole subject of damages arises only by reason of the defendant voluntarily making it a subject of lititgation. Considerable of the briefs of defendant's counsel is devoted to the subject of improper conduct and remarks on the part of plaintiff's counsel. Inasmuch, however, as we are of the opinion that the evidence which was offered and ruled out and was the chief subject of the alleged improprieties, should have been admitted, it follows that the defendant has not suffered thereby.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

out a prima facie case by simply introducing the note. The whole subject of damages claims only by reason of the defendant's voluntarily making it a subject of litigation. Considerable of the briefs of defendant's counsel is devoted to the subject of large or conduct and remarks on the part of plaintiff's counsel. Nevertheless, as we see of the opinion that the evidence which was offered and rules out and was the other subject of the alleged impropriety, should have been admitted, it follows that the defendant was not suffered thereby.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

243 - 23588

HELEN MORROW,

Appellee,

vs.

BLAIR McSTEELE,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

211 I.A. 566

MR. JUSTICE THOMSON delivered the opinion of the court.

Helen Morrow, the appellee, plaintiff, recovered a judgment by confession in the trial ~~court on a judgment note~~ against the defendant and two others on the note, all three being the makers of the note. Some time later, the court granted the defendant leave to file his appearance and plead to the merits, and entered an order that the judgment was to stand as security. The defendant filed a plea of the general issue and two special pleas, one setting forth want of consideration, and the other, failure of consideration. With the pleadings in this condition, on motion duly made by the plaintiff, the case was placed on the short cause calendar. Some time after that was done, the defendant made a motion to strike the case from the short cause calendar on the ground that it was not at issue when it was placed upon that calendar, and was still not at issue at the time the motion was made. This motion was denied. Two days thereafter, the plaintiff filed a document, which he termed a similiter. ~~This document~~ which contained a paragraph which was a similiter to the plea of the general issue which the defendant had filed. This

243 - 23888

HELEN MORROW,

Appellee,

vs.

HIAIR MOSTKEMIK,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

ILL.App.3d 66

MR. JUSTICE THEMIS delivered the opinion of the court.

Helen Morrow, the appellee, recovered a judgment by confession in the trial court on a judgment note against the defendant and two others, all three signing the makers of the note. Some time later, the court granted the defendant leave to file his appearance and plead to the merits, and entered an order that the judgment was to stand as security. The defendant filed a plea of the general issue and two special pleas, one setting forth want of consideration, and the other, failure of consideration. With the pleadings in this condition, on motion only made by the plaintiff, the case was placed on the short cause calendar. Some time after that was done, the defendant made a motion to strike the case from the short cause calendar on the ground that it was not at issue when it was placed upon that calendar, and was still not at issue at the time the motion was made. This motion was denied. Two days it earlier, the plaintiff filed a document which he termed a similiter. This document contained a paragraph which was a similiter to the plea of the general issue which the defendant had filed. This

paragraph was followed by a number of others in which the plaintiff traversed all the material allegations of the two special pleas which the defendant had filed. In traversing these allegations, the paragraphs in question were not directed to the two special pleas as such, but to the various paragraphs that made up the two pleas; and to that extent, these paragraphs purporting to constitute replications to the two special pleas, were inartificially drawn.

These paragraphs or replications concluded as follows:

"Wherefore plaintiff avers that she should not be barred from maintaining her aforesaid action because of any matters or things hereinabove pleaded by the said defendant, or any of his servants or agents. Wherefore plaintiff asks judgment."

The day following the filing of this document, the case was reached for trial on the short cause calendar. The defendant again moved to strike the case from that calendar which motion was denied. Thereupon, the defendant interposed a demurrer to the replications as filed by the plaintiff, excepting the first paragraph which was in the form of a similiter to the plea of the general issue. The demurrer set up a number of special grounds relied upon, to the general effect that the replications did not answer the special pleas, but were directed to various paragraphs making up the pleas and also that they failed to show what, if any, consideration had passed from

paragraph was followed by a number of others in which the plaintiff traversed all the material allegations of the two special pleas which the defendant had filed. In traversing these allegations, the paragraphs in question were not directed to the two special pleas as such, but to the various paragraphs that made up the two pleas; and to that extent, those paragraphs purporting to constitute replications to the two special pleas, were inartificially drawn.

These paragraphs or replications commenced as follows:

"Therefore plaintiff avers that she should not be barred from maintaining her aforesaid action because of any matters or things hereinbefore pleaded by the said defendant, or any of his servants or agents. Therefore plaintiff makes judgment."

The day following the filing of this document, the case was reached for trial on the short cause calendar. The defendant again moved to strike the case from that calendar which motion was denied. Thereupon, the defendant interposed a demurrer to the replications so filed by the plaintiff, excepting the first paragraph which was in the form of a similiter to the plea of the general issue. The demurrer was up a number of special grounds relied upon, to the general effect that the replications did not answer the special pleas, but were directed to various paragraphs making up the plea and also that they failed to show what, if any, consideration had passed from

the plaintiff for the note in question, and further that the replications did not conclude with a verification or to the country. The court overruled the demurrer. Thereupon counsel for the defendant further objected to the hearing of the case on the short cause calendar for the reason that it was not at issue at the time it was placed upon that calendar, and on the further ground that it was not yet at issue, and again moved the court to strike the case from the short cause calendar, which motion was overruled. A jury was then impaneled and the plaintiff presented her evidence, the defendant taking no part in the trial. At the conclusion of the plaintiff's evidence, the court directed the jury to find the issues for the plaintiff and assess her damages in the sum of $1218.00. It appeared that the judgment as originally entered had been for a larger amount, being based upon an erroneous computation of the interest, whereupon the court entered an order to the effect that the judgment entered by confession, was to stand, modified in amount, so as to make it a judgment for $1218.00.

From this judgment, the defendant has appealed and urges that the said judgment be reversed by reason of errors committed by the trial court in (1) placing the case on the short cause calendar when not at issue; (2) refusing to strike the case from the short cause calendar; (3) overruling the demurrer of the defendant to plaintiff's replications; (4) forcing defendant to trial over objection, before the case was properly at issue, and in refusing to sustain the defendant's objection thereto.

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From this judgment, the defendant has appealed and urges that the said judgment be reversed by reason of errors committed by the trial court in (1) placing the case on the short cause calendar when not at issue; (2) refusing to strike the case from the short cause calendar; (3) overruling the demurrer of the defendant to plaintiff's replications; (4) forcing defendant to trial over objection, before the cause was properly at issue, and in refusing to sustain the defendant's objection thereto.

It seems clear that this case should not have been placed on the short cause calendar, for at the time that was done, it clearly was not at issue. One of the rules of the Circuit Court which was introduced in evidence, provides that "no case shall be noticed for trial on such (short cause) calendar until the same is at issue." The case could not be said to be at issue within the meaning of this rule until an issue of fact had been formed on each of the pleas filed. French v. Scobey, 108 Ill. App. 606. For the same reasons, the first motion made by the defendant to strike the case from the short cause calendar should have been allowed. After a careful consideration of the matter we are unanimously of the opinion that these errors on the part of the trial court were not cured when replications were later filed by the plaintiff. The case was reached for trial on the short cause calendar the day after these replications were filed and the court directed the trial to proceed over defendant's objections. Section 27 of chapter 110 of our statutes provides:

> "Upon any party, his agent or attorney, in any suit at law, pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days' previous notice to all of the other parties to the suit, his or their agent or attorney, said suit shall be placed by the clerk upon said short cause calendar."

But the same situation would be presented if more than ten days had elapsed between the filing of the replications and the trial of the case. The case was erroneously placed upon the short cause calendar over defendant's objection. Further error was committed in overruling defendant's motion to strike the case from the short cause calendar. When the case was reached for

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> "Upon any party, his agent or attorney, in any suit at law, pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon two days' previous notice to all of the other parties to the suit, his or their agent or attorney, such suit shall be placed by the clerk upon said short cause calendar."

But the same situation would be presented if more than ten days had elapsed between the filing of the replications and the trial of the case. The case was erroneously placed upon the short cause calendar over defendant's objection. Further error was committed in overruling defendant's motion to strike the case from the short cause calendar. When the case was resumed for

trial defendant again moved to strike the case from the short cause calendar and objected to going on with the trial of the case. When the trial court again overruled defendant and directed the trial to proceed, the defendant took no part in it and therefore did not waive any of the points he had made.

The trial court properly overruled the defendant's demurrer to the plaintiff's replications, notwithstanding the fact that they were rather loosely drawn. Properly, the replications should have been directed to the two special pleas as such, rather than to the various paragraphs of which they were made up. It was not necessary that they set forth what consideration passed for the note from the plaintiff, which would have been pleading the evidence. It was sufficient for them to set forth, as they did, that a valuable consideration did pass from the plaintiff for the note, in due course. It is also true that the replications would have been more properly drawn if they had concluded to the country. The language with which they do conclude substantially amounts to that.

For the reasons stated, the judgment of the Circuit Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

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The trial court properly overruled the defendant's demurrer to the plaintiff's replications, notwithstanding the fact that they were rather loosely drawn. Properly, the replications should have been directed to the two special pleas as such, rather than to the various paragraphs of which they were made up. It was not necessary that they set forth that consideration passed for the note from the plaintiff, which some have been pleading the evidence. It was sufficient for them to set forth, as they did, that a valuable consideration did pass from the plaintiff for the note, in due course. It is also true that the replications would have been more properly drawn if they had concluded to the country. The language with which they do conclude substantially amounts to that.

For the reasons stated, the judgment of the circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

352 - 23697

CONSOLIDATED WATER POWER and PAPER CO., a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
THE LOUISVILLE HERALD CO., a corporation, Appellee.	211 I.A. 569

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Consolidated Water Power and Paper Co., brought this action against the defendant, The Louisville Herald Co., to recover a balance alleged to be due under an agreement for the sale of print paper. The defendant filed an affidavit of merits, denying that there was any balance due beyond the sum of $1,830.86, which amount, it said it stood ready topay. The trial court entered an order that the plaintiff ~~have and~~ recover from the defendant, the amount admitted by the latter to be due, namely, ~~the sum of $1,830.86~~, and by the same order, the court reserved for future determination, the question of the further claims of the plaintiff which were denied by the defendant. The amount so awarded ~~the plaintiff~~, was paid by the defendant, and the order satisfied in that regard. The defendant then filed a counter claim, ~~wherein it alleged~~ the existence of a written contract between the parties and a breach thereof on the part ~~of the~~ plaintiff, whereby the defendant had suffered damages as alleged. To this statement of counter-claim, the plaintiff filed an affidavit of merits, contending that it had not

CONSOLIDATED WATER POWER AND PAPER CO., a corporation,

Appellant,

vs.

THE LOUISVILLE REALTY CO., a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Consolidated Water Power and Paper Co., brought this action against the defendant, The Louisville Realty Co., to recover a balance alleged to be due under an agreement for the sale of paper. The defendant filed an affidavit of merits, declaring that there was no balance due beyond the sum of $1,050.00, which amount, it said it stood ready to pay. The trial court entered an order that the plaintiff be-and-recover from the defendant, the amount admitted by the latter to be due, namely, the sum of $1,050.00, and by the same order, the court reserved for future determination, the question of the further rights of the plaintiff which were denied by the defendant. The amount so admitted the plaintiff, was paid by the defendant, and the order satisfied in that respect. The defendant then filed a counter claim, wherein it alleged the existence of a written contract between the parties and a breach thereof on the part of the plaintiff, whereby the defendant was entitled damages as alleged. To this statement of counter-claim, the plaintiff filed an affidavit of merits, contending that

it had not committed any breach of the alleged contract, but had furnished the defendant all the paper it was obliged to furnish by its terms.

A trial of these issues was had before the court without a jury, as a result of which, the court found the issues for the defendant, The Louisville Herald Co., both on the issues involving the claim made by the plaintiff, and the counterclaim made by the defendant, and entered judgment against the plaintiff, and in favor of the defendant, for the sum of $5,656.29, being the damages alleged by it in its counterclaim. From this judgment, the plaintiff has appealed.

For convenience, we shall refer to the plaintiff, as the Manufacturer, and to the defendant, as the Publisher. So far as it is necessary to state them for the purpose of this opinion, the facts involved in this case, are as follows:

In the latter part of January, 1916, the parties entered into a written contract for the purchase and sale of print paper. The parts of the contract having to do with this controversy, are as follows:

> "The Manufacturer hereby agrees to sell and furnish to the Purchaser, and the Purchaser hereby agrees to purchase from the Manufacturer and receive for use in the publication of The Louisville Herald, a newspaper published in the City of Louisville, Kentucky, and for its continuous use during 11 months, from February 1, 1916 to December 31, 1916, two thousand tons (2,000 tons), with a leeway of five per cent over or under in quantity per year, of Standard Roll Print, which shall be substantially, of the same average quality, as sample attached thereto. Shipments shall be at the rate of about 180 tons per month * * *. The Purchaser hereby covenants and agrees to pay the Manufacturer for all paper delivered under this contract as above, two dollars ($2.00) per 100 pounds * * *. The first car, under this contract, shall be shipped on or about the 25th of January, 1916, and on all subsequent shipments, thirty days notice to

It had not committed any breach of the written contract, but had furnished the defendant all the paper it was obliged to furnish by its terms.

A trial of the issues so made before the court without a jury, a [illegible] of which, the court found the issues for the defendant, the Louisville [illegible], both on the issues involving the claim made by the plaintiff, and the counterclaim made by the defendant, and entered judgment against the plaintiff, and in favor of the defendant, for the sum of $3,255.89, being the damages alleged by it in its counterclaim. From this judgment, the plaintiff has appealed.

For convenience, we shall refer to the plaintiff, as the Manufacturer, and to the defendant, as the Publisher. So far as it is necessary to state them for the purpose of this opinion, the facts involved in this case, are as follows:

In the latter part of January, 1916, the parties entered into a written contract for the purchase and sale of print paper. The parts of the contract having to do with this controversy, are as follows:

> "The Manufacturer hereby agrees to sell and furnish to the Purchaser, and the Purchaser hereby agrees to purchase from the Manufacturer and receive for use in the publication of The Louisville Herald, a newspaper published in the City of Louisville, Kentucky, and [illegible] during 11 months, from February 1, 1916 to December 31, 1916, two thousand four [illegible] (2,400) tons, [illegible] of five per cent over or under in quantity per year, of standard roll print, which shall be substantially, of the same average quality, as the sample attached thereto. Shipments shall be at the rate of about 200 tons per month. The Purchaser hereby covenants and agrees to pay the Manufacturer for all paper delivered under this contract as above, two dollars ($2.00) per hundred pounds for the first car, under this contract, which is to be shipped on or about the 25th of January, 1916, and on all subsequent shipments, thirty days notice to

ship shall be given by the Purchaser."

Under this contract, the Publisher sent the Manufacturer formal written orders, from time to time, specifying the quantities and sizes to be shipped, and received paper from the Manufacturer in the following approximate quantities: February, 1916 - 74 tons; March, 1916 - 123 tons; April, 1916 - 157 tons; May, 1916 - 166 tons; June, 1916 - 163 tons; July, 1916 - 180 tons; August, 1916 - 171 tons; September, 1916 - 167 tons; October, 1916 - 190 tons; November, 1916 - 186 tons; December, 1916 - 186 tons. This constituted all the paper for which the Publisher sent the Manufacturer written orders or specifications in 1916, except one car for June, when the Publisher sent specifications for eight cars, and received only seven. To make this up, the Publisher increased its order for July from seven cars to eight. In the month of January, 1917, the Manufacturer shipped the Publisher 650 rolls of paper as ordered. All these shipments aggregated 1911.457 tons.

During the period of the contract, there were frequent delays in the shipments, and a number of letters were introduced in evidence in which the Publisher urged the Manufacturer to fill its specifications and ship paper as ordered, as promptly as possible, in order that a shortage might be avoided. It further appears that the Publisher requested and urged the Manufacturer to make shipments up to the full amount claimed by them under the contract. Mr. Gladfelter, the manager of the Publisher at Louisville, testified that during the period in question, he made repeated demands, both through letters and orally to Mr. Curtis, the sales manager of the Manufacturer, for

ship shall be given by the purchaser."

Under this arrangement, the publisher sent the manufacturer formal written orders, from time to time, specifying the quantities he also to be shipped, the received paper from the manufacturer in the following approximate quantities: February, 1918 - 74 tons; March, 1918 - 182 tons; April, 1918 - 187 tons; May, 1918 - 188 tons; June, 1918 - 185 tons; July, 1918 - 180 tons; August, 1918 - 171 tons; September, 1918 - 167 tons; October, 1918 - 190 tons; November, 1918 - 186 tons; December, 1918 - 186 tons. This constituted all the paper for which the publisher sent the manufacturer written orders or specifications in 1918, except one for June, when the publisher sent specifications for eight cars, but received only seven. To make this up, the publisher increased the order for July from seven cars to eight. In the month of January, 1919, the manufacturer shipped the publisher 886 rolls of paper as ordered. All these shipments aggregated 1811.457 tons.

During the period of the contract, there were frequent delays in the shipments, and a number of letters were introduced in evidence in which the publisher urged the manufacturer to fill its specifications and ship paper as ordered, as promptly as possible, in order that a shortage might be avoided. It further appears that the publisher requested and urged the manufacturer to make shipments up to the full amount claimed by it under the contract. Mr. Mudgett, the manager of the publisher at Louisville, testified that during the period in question, he made repeated demands, both through letters and orally to Mr. Curtis, the sales manager of the manufacturer, for

paper in greater amounts than the Publisher was receiving. He testified: "During the year, 1916, we endeavored to get shipments from the Consolidated Company of all the tonnage of paper contemplated under the contract. We made repeated demands on Mr. Curtis and to their office at Grand Rapids for the delivery of the paper. We were anxious to obtain all the paper from the Consolidated Company during 1916, and we made demands in order to create a surplus here (Louisville). We failed to get 188.543 tons; that is the amount which we demanded in 1916 under the contract, and which the Consolidated Company failed to deliver * * * everything that we specifically ordered by letter was received * * *. But we were constantly urging Mr. Curtis, orally, at our various meetings, to ship us more paper and protect us."

On cross examination, Mr. Gladfelter was asked "as a matter of fact, you never placed an order with him (Curtis) orally for any particular car or amount of paper in excess of your specifications, did you?" To this the witness answered, "I don't recall that I did specifically - no." We have been unable to find any provisions in the contract calling for written specifications from the Publisher as a condition precedent to the obligation of the Manufacturer to supply the quantity called for by the contract. All the Publisher had to do, under the contract, was to give thirty days notice to ship.

Mr. Gladfelter further testified: "We had been accustomed to carrying a reserve, and never had any trouble in carrying and keeping a reserve up to that time. Our contract prior to February 1, 1916 was with the Consolidated Water Power and Paper Co. and they had always

paper in quantity and made them the following was [illegible].
No [illegible] [illegible] the [illegible], we undertook to get
[illegible] from the [illegible] Company [illegible] the tonnage
of paper contemplated under the contract. We made repeated
demands on Mr. Martin and to [illegible] the grand Rapids
for the delivery of the paper. We were unable to obtain
all the paper from the [illegible] Company during 1916,
and we made [illegible] to order it [illegible] here
(Kalamazoo). We failed to get [illegible] some; that is the
matter which we [illegible] in bringing suit for contract, and
when the [illegible] the Company failed to [illegible] -
everything that we [illegible] [illegible] -
[illegible]. Not [illegible] were [illegible] [illegible],
orally, or [illegible] writing, [illegible] no more paper
was [illegible] us.

[illegible] examination, [illegible] was asked
"As a matter of [illegible] [illegible] [illegible]
(Curtis) orally [illegible] [illegible] paper
in excess of [illegible] [illegible]. [illegible]
[illegible] however, [illegible]
no." He [illegible] [illegible]
that [illegible] [illegible]
[illegible] [illegible]
or to supply the [illegible] [illegible] [illegible].
[illegible] [illegible] to do, [illegible] [illegible]
[illegible] [illegible] [illegible].

Mr. [illegible] Fosten (Curtis): [illegible]
[illegible] to [illegible] [illegible], [illegible]
in court [illegible] [illegible] [illegible] [illegible]
[illegible] prior to January 1, [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

kept us well supplied. We kept a safe quantity, * * * I should judge about a month's supply, here. During the operations of the contract of January 25, 1916, we were never able to keep such stock on hand, and we were not able to have the reserve stock during that period because we were held to definite specifications by the mill; they only wanted us to specify just what our requirements would be from month to month. * *. Mr. Curtis told me that they were hard pressed to fill their contracts, and that they were requesting all the newspapers with whom they had contracts, to order only the amount of paper that they actually consumed, and in ordering the amounts that we did, we were endeavoring to accommodate them." The substance of these alleged conversations with Mr. Curtis were not denied by him or any other witness for the Manufacturer.

Some time in November, 1916, Mr. Curtis representing the Manufacturer, called upon Mr. Town, representing the Publisher, requesting him to furnish the Manufacturer the figures as to the tonnage necessary to carry the Publisher through December 31, saying they would supply no paper beyond those requirements, under the contract. Mr. Town contended that that did not complete the contract. Mr. Curtis asserted it was all they proposed to do under the contract, and said that they would not ship the Publisher another pound of paper, unless the information requested was furnished. Mr. Curtis further said, the Manufacturer would supply the Publisher with the amount of tonnage necessary to carry them through December 31, under the contract, but over and beyond that, the price of any paper furnished, would be 3 1/2 cents per pound. The information demanded by the Manufacturer, was

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furnished by the Publisher, some time in November, or early in December. Following this, on December 8, 1916, Mr. Town wrote the Manufacturer as follows: "As per arrangements made with your Mr. Curtis, today, we should be glad to have you ship to Chicago, Louisville and Denver, the equivalent of one month's maximum consumption of paper in each of these three cities less (plus) whatever tonnage is as yet unprovided to take care of our needs for the present month, which in the case of Denver, we understand, is 116 tons; for Louisville, 2 cars, and for Chicago, 90 tons. Mr. Curtis informs us that all paper shipped over and above the amount necessary to meet our needs for the month of December, will be charged for, at the rate of three and one-half (3 1/2) cents per pound at mill."

The Publisher remitted for some of the paper furnished for use after December, 31, 1916, at 3 1/2 cents. It became necessary to use a small amount of this paper before December 31, and the Publisher advised the Manufacturer of this, claiming the benefit of the two cent rate as to that paper, whereupon the Manufacturer allowed the Publisher a credit of 1 1/2 cents per pound on such of the paper as had been paid for at 3 1/2 cents per pound, and which they had actually used before December 31. The other deliveries in January followed, which the Manufacturer had told the Publisher would be charged for, at the 3 1/2 cent rate, and as to which, the Publisher had written the letter of December 8. On February 21, 1917, the Publisher sent the Manufacturer a letter enclosing a check for $1,830.86, in full payment of all deliveries to that date, figured on the two cent rate, and requesting the delivery of the balance claimed by it under the contract, and then determined after all deliveries,

furnished by the Publisher, some time in November, or early in December. Following this, on December 6, 1916, Mr. Town wrote the Manufacturer as follows: "As per arrangements made with your Mr. Curtis, today, we should be glad to have you ship to Chicago, Louisville and Denver, the equivalent of one month's maximum consumption of paper in each of these three cities (plus) whatever tonnage is as yet unprovided to take care of our needs for the present month, which in the case of Denver, we understand, is 110 tons; for Louisville, 2 cars, and for Chicago, 90 tons. Mr. Curtis informs us that all paper shipped over and above the amount necessary to meet our needs for the month of December, will be charged for, at the rate of three and one-half (3 1\2) cents per pound at mill."

The Publisher remitted for some of the paper furnished for use after December, 31, 1916, at 3 1\2 cents. It became necessary to use a small amount of this paper before December 31, and the Publisher advised the Manufacturer of this, claiming the benefit of the two cent rate as to that paper, whereupon the Manufacturer allowed the Publisher a credit of 1 1\2 cents per pound on much of the paper as had been paid for at 3 1\2 cents per pound, and which they had actually used before December 31. The other deliveries in January followed, which the Manufacturer had told the Publisher would be charged for, at the 3 1\2 cent rate, and as to which, the Publisher had written the letter of December 8. On February 21, 1917, the Publisher sent the Manufacturer a letter enclosing a check for $1,850.80, in full payment of all deliveries to that date, figured on the two cent rate, and requesting the delivery of the balance claimed by it under the contract, and then determined after all deliveries

as amounting to 188.543 tons. The Manufacturer contended, it was not obliged to furnish the Publisher any further paper under the contract, and that there was due it under the alleged arrangements made by Mr. Curtis with Mr. Town, confirmed by the letter of December 8, written by the latter, 3 1/2 cents for each pound of paper it had furnished beyond that actually needed and used by the Publisher on and before December 31. The Publisher declining to pay for any of the paper delivered, beyond the two cent rate, the Manufacturer filed this suit, alleging an agreement based upon the conversation between Mr. Curtis and Mr. Town in the fall of 1916, and the correspondence following, principally Mr. Town's letter of December 8. The Publisher filed its affidavit of merits alleging that it owed the Manufacturer nothing beyond the remittance it had tendered February 21 1917, amounting to $1,830.86 which paid for all the paper the Manufacturer had delivered, based on the rate specified in the contract existing between the parties,namely, two cents per pound, which amount, it again tendered and later paid under the court order we have referred to. The Publisher then filed its counterclaim alleging an obligation on the part of the Manufacturer, under the contract of January 25, 1916, to furnish it 2100 tons of paper and that, although requested to furnish that full amount, during the contract period, the Manufacturer had failed to do so, but had defaulted to the extent of 188.543 tons, which the purchaser had been obliged to procure on the open market at an advance of 1 1/2 cents per pound over the price specified in the contract, and claiming damages at that rate on the amount of the Manufacturer's alleged default, under the contract.

as amounting to 182,343 tons. The manufacturer contended, it was not obliged to furnish the publisher any further paper under the contract, and that there was due it under the alleged arrangements made by Mr. Curtis with Mr. Town, confirmed by the letter of December 8, written by the latter, 3 1/2 cents for each pound of paper it had furnished beyond that actually needed and used by the Publisher on and before December 31. The Publisher declining to pay for any of the paper delivered, beyond the two cent rate, the Manufacturer filed this suit, alleging an agreement based upon the conversation between Mr. Curtis and Mr. Town in the fall of 1916, and the correspondence following, principally Mr. Town's letter of December 8. The Publisher filed its affidavit of merits alleging that it owed the Manufacturer nothing beyond the remittance it had tendered February 23 1917, amounting to $1,820.88 which pays for all the paper the Manufacturer had delivered, based on the rate specified in the contract existing between the parties,namely, two cents per pound, which amount, it again tendered and later paid under the court order to have referred to. The Publisher then filed its counterclaim alleging an obligation on the part of the Manufacturer, under the contract of January 25, 1916, to furnish it 3100 tons of paper and that, although requested to furnish this full amount, during the contract period, the Manufacturer had failed to do so, but has defaulted to the extent of 182,343 tons, which the Publisher had been obliged to procure on the open market at an advance of 1 1/2 cents per pound over the price specified in the contract, and claiming damages at that rate on the amount of the Manufacturer's alleged default, under the contract.

The entire controversy, in this case, is based upon the construction to be placed on the clauses of the contract which we have quoted.

In our opinion, the meaning of the contract is plain. As contended by the Publisher, the words "with a leeway of five per cent over or under in quantity per year," fix the minimum amount which the Manufacturer could compel the Publisher to take which was 1900 tons, and the maximum amount which the Publisher could compel the Manufacturer to deliver, which was 2100 tons. Staver Carriage Co. v. Park Steel Co., 220 Ill. 412. In construing this contract, we must give effect, if possible, to all the provisions it contains. If the construction contended for, by the Manufacturer is adopted, and the contract is held to be one for so much paper as the Publisher required for the continuous use of The Louisville Herald between February 1 and December 31, and no more, it would result in the complete rejection of the words "two thousand (2000) tons with a leeway of five per cent over or under in quantity per year." This should not be done without a plain necessity, or to prevent a defeat of the purposes sought to be attained by the parties to the contract. If the parties meant by the contract that the amount of paper covered by it, was to be such as the Publisher actually needed for the continuous publication of The Louisville Herald, between the dates named, and no more, then the words, giving the limits of the quantity covered by the contract, were superfluous and useless. By giving the contract the construction contended for by the Publisher, all the words in it are consistently given their proper significance, and plainly express the purposes

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apparently in the minds of the contracting parties when the contract was entered into. The quantity of paper sold under the contract was expressly put at 2000 tons with a five per cent leeway. This leeway clause was for the benefit of both parties. With that provision in the contract, the Publisher, was assured that it could not be compelled to take more than 1900 tons, but that it could call for and receive as high as 2100 tons; and on the other hand, the Manufacturer was assured that it could compel the Publisher to take and pay for 1900 tons, but that it could not be required by the Publisher to furnish more than the maximum of 2100 tons. The words "for use in the publication of The Louisville Herald * * * and for its continuous use during 11 months from February 1, 1916, to December 31, 1916" signify the use to which the paper was to be put, but in no way govern the quantity covered by the contract. Bloomington Canning Company v. Union Can Company, 94 Ill. App. 62.

The Manufacturer insists that certain acts of the Publisher which took place during the contract period, were such as to indicate that it was governing itself under the contract, according to the meaning for which the manufacturer now contends, and that the Publisher should be held to such an interpretation of the contract.

While it is true that courts will look to the acts of the parties indicating their interpretation of a contract, where its terms are ambiguous, the legal effect of the contract must be enforced, notwithstanding the acts of the parties under it, where its language and meaning are clear. Canterbury v. Miller, 76 Ill. 355;

apparently in the minds of the contracting parties when the contract was entered into. The quantity of paper sold under the contract was expressly put at 6000 tons with a five per cent leeway. This leeway clause was for the benefit of both parties. When that provision in the contract, the publisher, was assured that it could not be compelled to take more than 1000 tons, but that it could call for and receive as high as 6300 tons; and on the other hand, the manufacturer was assured that it could compel the publisher to take and pay for 1000 tons, but that it could not be required by the publisher to furnish more than the maximum of 6300 tons. The motion "for use in the publication of the Louisville Herald" was for its continuous use during 12 months from "February 1, 1916, to December 31, 1916" signify the use to which the paper was to be put, but in no way governs the quantity covered by the contract. Bloomington Gaming Company v. Union Gas Company, 94 Ill. App. 82.

The manufacturer insists that a certain note of the publisher was a book order during the war period, from such as to indicate that it was covering simply under the contract, according to [illegible] for which the manufacturer was anxious, and that the publisher should be held to such a interpretation of the contract.

While it is true that courts will look to the note of the parties surrounding the interpretation of a contract, where the terms are not clear, the legal effect of the contract must be ascertained, notwithstanding the fact of the parties under it, where the language is meaning are clear. Hutchinson v. Bailey, 70 [illegible], 351;

Stettauer v. Hamlin, 97 Ill. 312. It would seem as though this contract should be put in the latter class. Beyond this, however, the acts of the Publisher to which the Manufacturer has called our attention do not seem to us to be such as to indicate that itwas treating this as a requirement contract. It may be that the requests made to the Manufacturer by the Publisher on these two occasions, involving requests for shipments of paper to be used in executing large orders for printing circulars, indicate that it was considering these as orders for paper, over and beyond that involved in the contract, but we fail to see how this view can bring us to the construction of the contract, now insisted upon by the Manufacturer. At most, the Publisher, could not get more than 2100 tons under the contract, and it is apparent, from the evidence, that such an amount was approximately necessary to keep the paper going for the period covered by the contract. It would seem that rather than dip into its reserve, as far as it would be necessary to fill these large printing orders, the Publisher thought it the part of wisdom, not to fill the orders unless it couldsecure the paper necessary to do so, outside of the contract covering its regular supply.

The Manufacturer makes much of the fact that it filled all the written orders and specifications actually forwarded by the Publisher during the contract period, and contends, in this connection, that under the provisions of the contract, no shipments were to be made by it, except upon the monthly orders or requisitions of the Publisher. The contract does not so provide. It does say that "thirty days' notice to ship shall be given" by the Publisher, and that "shipments shall be at the rate of

Blackmore v. Hamlin, 97 Ill. 326. It could seem as though this contract should be put in the latter class. Beyond this, however, the note of the publisher to which the manufacturer has called our attention do not seem to me to go so far as to indicate that these strength this as a requirement contract. It may be that the requests made to the manufacturer by the publisher on these two occasions, involving requests for samples of paper to be used in executing large orders for printing circulars, indicate that it was considering these as orders for paper, even and beyond that involved in the contract, but we fail to see how this view can bring us to the construction of the contract, now insisted upon by the manufacturer. As most, the publisher, with not yet more than 400 tons under the contract, was in no apparent, from the evidence, that such an amount was absolutely necessary to keep the paper going for the period covered by the contract. It could seem that rather than ship into its factory, as far as it could be necessary to fill their large printing orders, the publisher thought it the part of wisdom, not to fill the order until it was in proper condition to do so, outside of the contract covering its regular use.

The manufacturer makes much of the fact that it filled all the written orders and specifications, actually forwarded by the publisher during the contract period, the contention, in this connection, that under the terms of the contract, no shipments were to be made by it, except upon the monthly orders or requisitions of the publisher. The contract does not so provide. It does say that "thirty days' notice to ship must be given" by the Publisher, and that "shipments shall be at the rate of

about 180 tons per month." We have previously referred to the uncontradicted testimony of Mr. Gladfelter, to the effect that almost continuously throughout the contract period, he was urging the Manufacturer, by telegram, letter and conversation, both to hasten and increase shipments; that the Manufacturer represented that there was a shortage of paper, and requested the Publisher to limit its monthly specifications to the amounts actually necessary to keep it going, which was done to accommodate the Manufacturer; but that the Manufacturer was repeatedly being urged to make further shipments, to prevent the reserve supply of the Publisher from falling too far below the safety point, which was the condition in which the Publisher frequently found itself during the contract period. It may be well, as urged by the Manufacturer, that under this contract, the Publisher could not order 40, 50 or 60 tons a month, at its pleasure, for the greater part of the contract period, and then order the balance for delivery during the closing months of the contract. Nor, on the other hand, should the Manufacturer be permitted to keep the quantity called for, as low as possible, at its urgent requests, and then escape the delivery of the full amount called for under the contract, by an appeal to the monthly shipment clause of the contract. In referring to this clause, the Manufacturer treats it, as though the five per cent leeway provision of the contract applied to that clause. It clearly does not. The contract calls for shipments at the rate of "about 180 tons a month." The five per cent leeway clause in the contract applies to the total amount covered by the contract, and it is significant that this clause is further modified by the

about 12C tons per month." He then previously referred to the unmodified testimony of Mr. Gladstone, to the effect that almost continuously throughout the contract period, he was urging the manufacturers, by telegram, letter and conversation, with to action and increase supplies; that the manufacturers represented that there was a shortage of power, and requested the contractor to limit its monthly requisitions to the amounts actually necessary to keep it going, until they could accommodate the manufacturer; but that the manufacturer was repeatedly asking again on the first of January, to increase the power supply of the publication from twelve to fifteen the monthly point, which [illegible] the contractor fulfilled frequently [illegible] part. It may be well [illegible] be [illegible], that under this method, the [illegible] 60, 50 or 60 tons a month, as the [illegible], for the greater part of the contract period, [illegible] to all the information available regarding the [illegible] of the contract. Nor, on the other hand, [illegible] to permit the manufacturer to keep [illegible] as long as possible, at the disposal [illegible], and [illegible] the liver, if the full amount called for [illegible] the contractor, by an appeal to the [illegible] of the contractor. In [illegible] to [illegible], the [illegible] [illegible] it, he [illegible] the [illegible] [illegible] to [illegible] [illegible]. [illegible] the contract calls for [illegible] of the [illegible] [illegible] the [illegible] [illegible] to the total amount [illegible] by the [illegible], and it is [illegible] that [illegible] [illegible] by the

phrase "in quantity per year." The evidence shows that this contract was on one of the regular forms provided by the Manufacturer in making its yearly contracts with publishers who were its customers. The phrase in question is to be given its evident meaning, although this particular contract covered only 11 months. The presence of thatphrase in the contract, in our judgment, strengthens the interpretation contended for by the Publisher.

Even treating this as a requirement contract and assuming that the naming of the amount was simply to give the limits within which the Manufacturer could call on the Publisher to take the paper, or the Publisher could call on the Manufacturer to furnish the paper as needed for the specific purpose for which the paper was to be delivered and accepted (the position contended for, by the Manufacturer), the evidence shows that the Publisher did need the maximum amount called for by the contract for its continuous use in publishing The Louisville Herald, during the period named in the contract, and was, therefore, within its rights in calling for the maximum of 2100 tons, and that it did all that it was required to do, under the contract, to secure that maximum amount within the contract period, thereby obligating the Manufacturer to supply that amount, under the contract. Any contention, that the Manufacturer could insist, as it did in November, on knowing just how much paper was actually needed to publish The Louisville Herald up to and including December 31, and to decline to deliver anything under the contract beyond that, is untenable.

phrase "in quantity per year." The evidence shows that this contract was unlike of the regular forms provided by the Manufacturer in making its yearly contracts with publishers who were its customers. The phrase in question is to be given its evident meaning, although this particular contract covered only 11 months. The presence of this phrase in the contract, in our judgment, strengthens the interpretation contended for by the Publisher.

Even treating this as a requirement contract and assuming that the meaning of the amount was simply to give the limits within which the Manufacturer would call on the Publisher to take the paper, or the Publisher could call on the Manufacturer to furnish the paper as needed for the specific purpose for which the paper was to be delivered and accepted (the position contended for, by the Manufacturer), the evidence shows that the Publisher did meet the maximum amount called for by the contract for its continuous use in publishing The Louisville Herald, during the period named in the contract, and was, therefore, within its rights in calling for the maximum of 2100 tons, and that it did all that it was required to do, under the contract, to secure that maximum amount within the contract period, thereby obligating the Manufacturer to supply that amount, under the contract. Any contention, that the Manufacturer could insist, as it did in November, on knowing just how much paper was actually needed to publish The Louisville Herald up to and including December 31, and to decline to deliver anything under the contract beyond that, is untenable.

The testimony is that the amount necessary for the continuous use of the Publisher in publishing a daily newspaper for a given period, under the conditions as disclosed by the evidence, contemplates the continuous presence of about a month's supply as a reserve. At the beginning of this period, the Publisher did have on hand such a supply, amounting to about 254 tons. This was at the close of the period of a similar contract between these parties. At times during the contract period, involved here, this reserve got very low. If the Manufacturer's interpretation of this contract is to be accepted, the Publisher would find itself, at the close of the contract period, without any reserve at all, the last roll delivered, under the contract, having been consumed in getting out the paper on the closing day of the period. That such a condition was in the contemplation of either party to this contract, is impossible. The Publisher had the right to use as much of the paper received under the contract as was reasonably necessary, to properly replenish its reserve. Staver Carriage Co. v. Park Steel Co., 220 Ill. 412, 416. And the presence of a clause in the contract to the effect that the paper was for the continuous use of the Publisher during the period named, can not be made to mean that the Publisher could not call for and receive paper under the contract, and replenish its reserve with it, and the fact that some of that reserve as so replenished by paper received under the contract, might not actually be used until after the period covered by the contract, is wholly immaterial and beside the question.

In our opinion, there is no particular significance in the fact that after the Manufacturer had told the Publisher

The testimony is that the amount necessary for the continuous use of the Publisher in publishing a daily newspaper for a given period, under the conditions as disclosed by the evidence, contemplates the continuous presence of about a month's supply as a reserve. At the beginning of this period, the publisher did have on hand such a supply, amounting to about 500 tons. This was at the close of the period of a similar contract between these parties. At times during the contract period, involved here, this reserve got very low. If the manufacturer's interpretation of this contract is to be accepted, the publisher would find itself, at the close of the contract period, without any reserve at all, the last roll delivered, under the contract, having been consumed in getting out the paper on the closing day of the period. That such a contention was in the contemplation of either party to this contract, is improbable. The publisher had the right to use as much of the paper received under the contract as was reasonably necessary, to properly replenish its reserve. Beaver Paperware Co. v. Park Edgar Co., 224 Ill. 411, 414. And the presence of a clause in the contract to the effect that the paper was for the continuous use of the publisher during the period mentioned, can not be made to mean that the publisher could not sell for and receive paper under the contract, and replenish its reserve with it, and the fact that some of that reserve as so replenished by paper received under the contract, might not naturally be used until after the period covered by the contract, is equally immaterial and beside the question.

In our opinion, there is no particular significance in the fact that after the manufacturer had told the publisher

that it would deliver no paper at the 2 cent rate, under the contract, beyond the amount necessary for its continuous use in publishing its paper, up to and including December 31, and that the price for any additional paper furnished would be 3 1/2 cents per pound, and after the Publisher had received and paid for certain paper at that figure, beyond the quantity it had designated as necessary to carry it through December 31, and had later found it necessary to use some six thousand pounds of the paper which it had paid for at the 3 1/2 cent rate, to carry it through December 31, it applied for and received, a rebate of 1 1/2 cents per pound on the amount so used. The Manufacturer had said it would supply all paper actually needed and used up to and including December 31 at the two cent rate, and in applying for the rebate in question, the Publisher was simply getting all it deemed it could, under the construction the Manufacturer was insisting upon, and its action, in this regard, can in no sense be considered as evidence of any subjective interpretation of the contract, on its part.

Evidence was admitted by the trial court, to the effect that there was a custom in the print paper trade to supply newspapers under contracts, such as the one herein involved, and that under such contracts, according to that custom, the publishers would receive the paper necessary to print their editions during the period named by the contract, but that such a contract would not contemplate the furnishing of paper for use beyond the expiration of the contract period; that under this custom, the publisher must take the minimum amount specified in the contract, and is entitled to the maximum if he needs it in the

that it would deliver no paper at the 2 cent rate, under the contract, beyond the amount necessary for its consumption in publishing its paper, up to and including December 31, and that the price for any additional paper furnished would be 3 1/2 cents per pound, and after the publisher had received and paid for certain paper at that figure, beyond the quantity it had designated as necessary to carry it through December 31, and had later found it necessary to use some six thousand pounds of the paper which it had paid for at the 3 1/2 cent rate, to carry it through December 31, it applied for and received, a rebate of 1 1/2 cents per pound on the amount so used. The manufacturer had said it would supply all paper actually needed and used up to and including December 31 at the two cent rate, and in applying for the rebate in question, the publisher was simply getting all it demand it could, under the construction the manufacturer was insisting upon. And its action, in this regard, can in no sense be considered as evidence of any subjective interpretation of the contract, on its part.

Evidence was admitted by the trial court, to the effect that there was a custom in the print paper trade to supply newspapers under contracts, such as the one herein involved, and that under such contracts, according to that custom, the publishers would receive the paper necessary to print their editions during the period named by the contract, but that such a contract would not contemplate the furnishing of paper for use beyond the expiration of the contract period; that under this custom, the publisher must take the minimum amount specified in the contract, and is entitled to the maximum if he needs it the

printing of his editions. Under the evidence, the Publisher has shown, in our judgment, that it did need the maximum for its use in publishing The Louisville Herald during the period specified in the contract, taking into consideration the need of the presence of a proper reserve stock which must be included in all calculations of the amount necessary for the continuous use of the Publisher during the period contracted for. But if there may be aid to be a difference between the custom referred to and the terms of this contract, the contract must control, and its terms must be complied with, notwithstanding the custom, for its terms and requirements are clear. Dixon v. Dunham, 14 Ill. 324; Fay v. Strawn, 32 Ill. 295.

As to the claim that the conversation had by Mr. Town, representing the Publisher, with Mr. Curtis, representing the Manufacturer, in November and December, and the letter December 8 written by Mr. Town to the Manufacturer, to which we have referred in reciting the facts of the case, constituted a contract to pay for all paper used after December 31 at the 3 1/2 cent rate, our opinion is, that it can not be maintained. A careful analysis of the letter in question, shows that there was no promise or agreement, either express or implied, on the part of Mr. Town to pay 3 1/2 cents per pound for all paper furnished beyond that called for by the figures demanded by the Manufacturer and furnished by the Publisher giving the amount actually necessary to see the latter through December 31. The Publisher can not be said to have waived any of the rights it was insisting upon, under the contract, by furnishing the Manufacturer the information as to the amount of paper absolutely necessary to publish The Louisville Herald up to and including December 31.

printing of his editions. Under the evidence, the publisher has shown, in our judgment, that it did need the maximum for its use in publishing the Lackawanna Herald during the period specified in the contract, taking into consideration the need of the presence of a proper reading room which must be included in all calculations of the amount necessary for the maintenance of the publisher during the period contracted for. But if there may be said to be a difference between the certain referred to in the terms of this contract, the contract must control. And the terms must be complied with, notwithstanding, the question, for the terms and requirements are clear. Mizen v. Lumber, 14 Ill. App. 394; Lee v. Lewis, 32 Ill. App. 395.

As to the claim that the conversation had by Mr. Town, representing the publisher, with Mr. Wills, representing the manufacturer, in November and December, and the letter subsequent to the contract to the manufacturer, to which we have referred in reciting the facts of the case, constituted a contract to pay for all paper used after December 31 at the $ 1/2 cent rate, our opinion is, that it can not be maintained. A careful analysis of the letter in question, shows that it was no more nor less or nothing, either a promise or implied, on the part of Mr. Town to pay 1 1/2 cents per pound for [illegible] Turn and Bryce that contained [illegible] the figures furnished by the manufacturer are [illegible] the publisher during the amount actually necessary to [illegible] December 31. The publisher [illegible] any of the figures in the letter, [illegible] times, by increasing the manufacturer's [illegible] to the amount of paper absolutely necessary [illegible] The Lackawanna Herald up to and including December 31,

Those figures were furnished under the threat that, if they were not forthcoming, there would not be another pound of paper delivered by the Manufacturer to the Publisher. What such a consequence would mean to the publisher of a daily newspaper in a large city, needs no elaboration. The Manufacturer lays much stress on the phrase "as per arrangements made with your Mr. Curtis today," as used by Mr. Town in his letter of December 8. But in the "arrangements made with your Mr. Curtis", as shown by the evidence, there was no agreement on Mr. Town's part to pay the 3 1/2 cent rate on any paper furnished, short of the maximum of 2100 tons he claimed, the Publisher was entitled to, under the contract. The Manufacturer claims that a constructive or implied agreement to pay the 3 1/2 cent rate for all paper beyond that actually needed up to and including December 31, arose when Mr. Town sent in his order or request for shipment as contained in his letter of December 8, following the conditions and terms as to such deliveries which had been specified and laid down by Mr. Curtis. This position might be sound, were it not for the existence of the written contract of January 25, 1916, and the fact that Mr. Town was as insistent as to his rights under that contract in his talks with Mr. Curtis, as the latter was in denying them. The letter of December 8 by Mr. Town to the Manufacturer must be read in the light of the fact that the "arrangements made with your Mr. Curtis" referred to therein, consisted of certain demands or conditions laid down by Mr. Curtis, and vehement protests, on the other hand, by Mr. Town, but no promises, whatever, on his part, so far as

These figures were furnished under the threat that, if they were not forthcoming, there would not be another pound of paper delivered by the manufacturer to the Publisher. That such a consequence would mean to the publisher of a daily newspaper in a large city, needs no elaboration. The manufacturer lays much stress on the phrase "as per arrangements made with your Mr. Curtis today," as used by Mr. Town in his letter of December 8. But in the "arrangements made with your Mr. Curtis", as shown by the evidence, there was no agreement on Mr. Town's part to pay the 3 1/2 cent rate on any paper furnished, short of the maximum of 2500 tons he claimed, the publisher was entitled to, under the contract. The manufacturer claims that a constructive or implied agreement to pay the 3 1/2 cent rate for all paper beyond that actually needed up to and including December 31, arose when Mr. Town sent in his order or request for shipment as contained in his letter of December 8, following the conditions and terms as to such delivery which had been specified and laid down by Mr. Curtis. This position might be sound, were it not for the existence of the written contract of January 28, 1910, and the fact that Mr. Town was an intelligent man to the rights under that contract in his talks with Mr. Curtis, as the letter was in carrying them. The letter of December 8 by Mr. Town to the manufacturer must be read in the light of the fact that the "arrangements made with your Mr. Curtis" referred to therein, consisted of certain demands or conditions laid down by Mr. Curtis, and vehement protests, on the other hand, by Mr. Town, but no promises, whatever, on his part, so far as

the evidence discloses. In agreeing to deliver paper beyond that needed to see the Publisher through December 31, at the 3 1/2 cent rate, the Manufacturer was undertaking to do what it was already obliged to do under the contract up to 2100 tons, at the 2 cent rate, and therefore, even if Mr. Town had promised expressly or may be considered as having promised by implication to pay the increased rate for it, the promise would be void and unenforcible, for it was without consideration. Purington Paving Brick Co. v. Jenkins, 165 Ill. App. 434.

The publisher is entitled to recover the difference of 1 1/2 cents per pound on the amount of paper covered by the contract but never delivered by the Manufacturer amounting to 188.543 tons, and this notwithstanding the fact, the Publisher submitted no proof to the effect that it had purchased this paper at the price of 3 1/2 cents, as it had alleged in its statement of counter-claim. That allegation may be treated as surplusage. Where the vendor refuses to keep his contract of sale, the vendee may recover his damages without the actual purchase of goods elsewhere. Follansbee v. Adams, 86 Ill. 13; Summons v. Hibbard Spencer & Bartlett Co., 153 Ill. 102.

While there is some evidence tending to show that the market price for this paper in January, 1917 was higher than 3 1/2 cents per pound, the Manufacturer seems to have been willing to supply the Publisher with additional paper at that figure, and consequently, the damages of the latter can not be based on a higher market price than 3 1/2 cents per pound.

the evidence discloses. In agreeing to deliver paper beyond that needed to see the publisher through December 31, at the 3 1/2 cent rate, the manufacturer was undertaking to do what it was already obliged to do under the contract up to 2100 tons, at the 2 cent rate, and therefore, even if Mr. Town had promised expressly or may be considered as having promised by implication to pay the increased rate for it, the promise would be void and unenforcible, for it was without consideration. Buffington Paving Brick Co. v. Jennings, 165 Ill. App. 434.

The publisher is entitled to recover the difference of 1 1/2 cents per pound on the amount of paper covered by the contract but never delivered by the manufacturer amounting to 188,343 tons, and since notwithstanding the fact, the publisher submitted no proof to the effect that it had purchased this paper at the price of 3 1/2 cents, as it had alleged in its statement of counter-claim. That allegation may be treated as surplusage. Where the vendor refuses to keep his contract of sale, the vendee may recover his damages without the usual proclaims of goods elsewhere. Williamson v. Adams, 153 Ill. 103.

While there is some evidence tending to show that the market price for this paper in January, 1917 was higher than 3 1/2 cents per pound, the manufacturer seems to have been willing to supply the publisher with additional paper at that figure, and consequently, the damages of the latter can not be based on a higher market price than 3 1/2 cents per pound.

For the reasons given, the judgment of the Municipal Court will be affirmed, both on the issues involved in the claim made by the Manufacturer and the counter-claim made by the Publisher.

AFFIRMED.

For the reasons given, the judgment of the Municipal Court will be affirmed, both on the issues involved in the claim made by the Manufacturer and the counter-claim made by the Publisher.

AFFIRMED.

353 - 23698

CONSOLIDATED WATER POWER AND PAPER CO., a corporation, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT
DENVER PUBLISHING COMPANY, a corporation, Appellee.	OF CHICAGO.

211 I.A. 572

MR. JUSTICE THOMSON delivered the opinion of the court.

Although the facts involved in this case are not in all points the same as those involved in the case of Consolidated Water Power and Paper Co. v. The Louisville Herald Co., being case #23697 in this court, the issues which they present are practically the same as the issues which we have considered in connection with that case, and what we have said in the opinion this day rendered in that case, applies equally here.

For the reasons set forth in that opinion, the judgment of the Municipal Court, in favor of the defendant for the sum of $1,710.90, will be affirmed.

AFFIRMED.

282 - 82028

CONSOLIDATED WATER POWER AND PAPER CO., a corporation, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT
DENVER PUBLISHING COMPANY, a corporation, Appellee.	OF CHICAGO.

211 I.A. 572

MR. JUSTICE THOMSON delivered the opinion of the court.

Although the facts involved in this case are not in all points the same as those involved in the case of Consolidated Water Power and Paper Co. v. The Lowell Ville Herald Co., being case #82027 in this court, the issues which they present are practically the same as the issues which we have considered in connection with that case, and what we have said in the opinion this day rendered in that case, applies equally here.

For the reasons set forth in that opinion, the judgment of the Municipal Court, in favor of the defendant for the sum of $1,710.50, will be affirmed.

AFFIRMED.

479 - 23824

EDWARD LYMAN BILL, Inc.,
PUBLISHERS OF THE MUSIC
TRADE REVIEW,
Appellee,

vs.

CHARLES H. LEECH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 578

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action of the fourth class in the Municipal Court of Chicago wherein the plaintiff sought to recover an amount alleged to be due from the defendant for certain advertising which was the subject of contract between the parties. A trial was had before the court without a jury and the court found the issues for the plaintiff and assessed the plaintiff's damages at $262.08, and entered judgment for that amount, from which the defendant has appealed.

The defendant filed an affidavit of merits, in which he set up (1) that the plaintiff was not a corporation authorized to do business in the State of Illinois, (2) that he did not contract with the plaintiff for any advertising, and that the plaintiff did not furnish any advertising to the defendant, and (3) that the defendant had not promised the plaintiff to pay for any advertising. The only witness in the case testified for the plaintiff that he was a trade paper solicitor, and had been employed by the plaintiff for four years and a half, that he had

479 - 22824

EDWARD LYMAN BILL, Inc., PUBLISHERS OF THE MUSIC TRADE REVIEW, Appellee,	
vs.	MENTAL ERROR MUNICIPAL COURT OF CHICAGO.
CHARLES E. LYNCH, Appellant.	211 I.A. 579

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an action of the fourth class in the Municipal Court of Chicago wherein the plaintiff sought to recover an amount alleged to be due from the defendant for certain advertising which was the subject of contract between the parties. A trial was had before the court without a jury and the court found the issues for the plaintiff and assessed the plaintiff's damages at $400.00, and entered judgment for that amount, from which the defendant has appealed.

The defendant filed an affidavit of merits, in which he set up (1) that the plaintiff was not a corporation authorized to do business in the State of Illinois, (2) that he did not contract with the plaintiff for any advertising, and that the plaintiff did not furnish any advertising to the defendant, and (3) that the defendant had not promised the plaintiff to pay for any advertising. The only witness in the case testified for the plaintiff that he was a trade paper solicitor, and had been employed by the plaintiff for four years and a half, that he had

solicited advertising from the defendant and had secured two advertising contracts from him, which contracts were introduced in evidence. Both of these alleged contracts were in the form of communications addressed to "Edward Lyman Bill." In one of them, that name is followed by the word "publisher" and in the other, by the words, "editor and proprietor". They are both signed by the defendant. The execution of these contracts is not denied, nor the fact that the advertising as covered by the contracts, was furnished. The witness further identified two letters which were admitted in evidence, both signed by the defendant, one dated April 22, 1915 addressed to "The Music Trade Review" and the other, March 18, 1916 to "A. J. Trimpe, Business Manager of Music Trade Review." In these communications, the defendant expresses appreciation of the courtesy which has been extended him in regard to his account, and proceeds to explain why he has not been able to pay it, and expresses the hope that he will be in a position to pay the account in full, within a short time. The witness testified further that the Music Trade Review is a paper published by the plaintiff, and that no part of the account had been paid. On cross-examination, the witness testified that he was employed in 1914 by Edward Lyman Bill, and that the latter died January 1, 1916. Counsel for the defendant asked "and during Mr. Bill's life-time, he was the gentleman who conducted the business as proprietor and editor, etc.?", and the witness replied "He was sole proprietor."

The defendant contends that the evidence shows that his contracts were with Edward Lyman Bill, personally,

solicited advertising from the defendant and had secured two advertising contracts from him, which contracts were introduced in evidence. Both of these alleged contracts were in the form of communications addressed to "Howard Lyman Hill." In one of them, that name is followed by the word "publisher" and in the other, by the words, "editor and proprietor". They are both signed by the defendant. The execution of these contracts is not denied, nor the fact that the advertising as covered by the contracts, was furnished. The witness further identified two letters which were admitted in evidence, both signed by the defendant, one dated April 11, 1924 addressed to "The Music Trade Review" and the other, March 18, 1924 to "A. J. Tripp, Business Manager of Music Trade Review." In these communications, the defendant expressed appreciation of the courtesy which the "Review" extended him in regard to his account, and promised to explain why he had not been able to pay it, and expressed the hope that he will be in a position to pay the account in full, within a short time. The witness testified further that the "Music Trade Review" is a paper published by the plaintiff, and that no part of the account had been paid. On cross-examination, the witness testified that he had seen defendant in 1924 by Howard Lyman Hill, and in the latter part of January 1, 1923. Counsel for the defendant asked "for during Mr. Hill's life-time, he was the proprietor and conducted the business as proprietor and editor, etc.?", and the witness replied "He was sole proprietor."

The defendant contends that the evidence above that his contracts were with "Howard Lyman Hill", personally,

and not with the corporation, and that, inasmuch as the plaintiff is Edward Lyman Bill, a corporation, and there is no proof of an assignment of the account from Edward Lyman Bill to the corporation, the plaintiff is not shown to have such an interest in the subject-matter as to sustain the suit, and further, that there is a fatal variance between the allegations of the statement of claim and proof. There is no merit to either of these contentions. So far as the record shows, the corporate name of the corporation involved is "Edward Lyman Bill," the letters "inc." being descriptive of the corporation, and not a part of the corporate name. There is nothing in the record to show that the contracts in question were not with "Edward Lyman Bill" the corporation. Certainly nothing to the contrary is indicated or proven by the fact that, during his life-time, Edward Lyman Bill was the sole proprietor of the business. Clearly, defendant's promises to pay this account, as contained in his letters, one of which was written after the death of Edward Lyman Bill, were made by him to the corporation. There was further evidence of an oral promise to pay the account made by the defendant to the witness, who testified that the promise was made at a time when the witness was in the employ of the plaintiff corporation.

The defendant makes the further point, that the plaintiff was not a corporation authorized to do business in Illinois. There is no evidence in the record bearing upon this issue. The burden of proving that defense was upon the defendant. Abhau v. Grassie, 262 Ill. 636, 639, and cases there cited.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

had not with the corporation, and that, inasmuch as the plaintiff is Edward Lyman Bill, a corporation, and there is no proof of an assignment of the account from Edward Lyman Bill to the corporation, the plaintiff is not shown to have such an interest in the subject-matter as to sustain the suit, and further, that there is a fatal variance between the allegations of the statement of claim and proof. There is no merit to either of these contentions. So far as the record shows, the corporate name of the corporation involved is "Edward Lyman Bill," the letters "ing." being descriptive of the corporation, and not a part of the corporate name. There is nothing in the record to show that the contracts in question were not with "Edward Lyman Bill" the corporation. Certainly nothing to the contrary is indicated or proven by the fact that, during his life-time, Edward Lyman Bill was the sole proprietor of the business. Clearly, defendant's promises to pay this account, as contained in his letters, one of which was written after the death of Edward Lyman Bill, were made by him to the corporation. There was further evidence of an oral promise to pay the account made by the defendant to the witness, who testified that the promise was made at a time when the witness was in the employ of the plaintiff corporation.

The defendant makes the further point, that the plaintiff was not a corporation authorized to do business in Illinois. There is no evidence in the record bearing upon this issue. The burden of proving that defense was upon the defendant. Ayres v. Dunning, 206 Ill. 630, 639, and cases there cited.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

504 - 23849

LAURENCE M. FINE,
Appellant,

vs.

LOUIS FOX and LEO FOX,
Appellees.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

211 I.A. 579

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, in which the plaintiff sought to recover for an alleged conversion by the defendants of personal property, ownership of which, was claimed by the plaintiff. A hearing was had by the trial court without a jury, resulting in a finding of the issues for the defendants. Judgment followed accordingly, from which the plaintiff has appealed.

There were three adjoining lots held by one owner. The south lot was sold to the defendants. The middle lot and north lot were sold to one Fryer. The latter conveyed his two lots to another, and in that transaction, was represented by the plaintiff. At the time of this last conveyance, the plaintiff purchased from Fryer for the sum of $15.00, in cash, and his services in connection with the conveyance, which he valued at $50.00, a certain iron fence which the evidence shows had been erected across the middle lot by the man who had originally owned all three of the lots.

504 - 23649

LAWRENCE M. MIKE,

Appellant,

vs.

LOUIS YOX and LEO YOX,

Appellees.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

MR. JUSTICE SCHMACH delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, in which the plaintiff sought to recover for an alleged conversion by the defendants of personal property, ownership of which, was claimed by the plaintiff. A hearing was had by the trial court without a jury, resulting in a finding of the issues for the defendants. Judgment followed accordingly, from which the plaintiff has appealed.

There were three adjoining lots held by one owner. The south lot was sold to the defendants. The middle lot and north lot were sold to one Dryer. The latter conveyed his two lots to another, and in that transaction, was represented by the plaintiff. At the time of this last conveyance, the plaintiff purchased from Dryer for the sum of $15.00, in cash, and his services in connection with the conveyance, which he valued at $50.00, a certain iron fence which the evidence shows had been erected across the middle lot by the man who had originally owned all three of the lots.

The north wall of the house located on the lot owned by the defendants was erected on or very close to their north lot line and a section of this iron fence extended back from the front line of the middle lot, to the steps leading up to the porch of the defendants' house. At the time Fryer sold his two lots, one of the defendants saw him removing this fence that extended across the middle lot which was vacant. He made inquiries of Fryer as to the reason for removing the fence, and the latter told him that he had sold his property, and the purchasers were to take possession on the following Monday, and therefore, he was removing the fence. Nothing appears to have been said by Fryer about any sale of the fence by him to the plaintiff. The one of the defendants who had this conversation with Fryer testified that he assumed that the part of the fence that extended back along his stairway on or near his lot line, belonged to him, and therefore, he took that part of the fence up and put it in his basement. The evidence indicates that this was done in the presence of Fryer, who made no objection. The remainder of the fence having been delivered to the plaintiff, he discovered, upon erecting it, that a section was missing and upon inquiry, discovered that it was in the defendants' possession, and it is this section of the iron fence which the plaintiff claims was the subject of conversion by the defendants. We have carefully examined both the abstract and the record and are of the opinion that the court did not err in finding the issues, as to the conversion, for the defendants.

The north wall of the house located on the lot owned by the defendants was erected quite very close to their north lot line and a section of this iron fence extended back from the front line of the middle lot, to the steps leading up to the porch of the defendants' house. At the time Tryer sold his two lots, one of the defendants saw him removing this fence that extended across the middle lot which was vacant. He made inquiries of Tryer as to the reason for removing the fence, and the latter told him that he had sold his property, and the purchasers were to take possession on the following Monday, and therefore, he was removing the fence. Nothing appears to have been said by Tryer about any sale of the fence by him to the plaintiff. The one of the defendants who had this conversation with Tryer testifies that he assumed that the part of the fence that extended back along his stairway on or near his lot line, belonged to him, and therefore, he took that part of the fence up and put it in his basement. The evidence indicates that this was done in the presence of Tryer, who made no objection. The remainder of the fence having been delivered to the plaintiff, he discovered, upon erecting it, that a section was missing and upon inquiry, discovered that it was in the defendants' possession, and it is this section of the iron fence which the plaintiff claims was the subject of conversion by the defendants. We have carefully examined both the abstract and the record and are of the opinion that the court did not err in finding the issues, as to the conversion, for the defendants.

It is urged that there must be a reversal of the finding of the trial court on the ground that the plaintiff was denied the right of taking a non-suit. After the plaintiff and one other witness testifying in his behalf had concluded their testimony, the plaintiff rested except as to one witness, who had not arrived in court and who was to testify as to the value of the fence. Thereupon, one of the defendants took the stand and proceeded to testify. At the conclusion of his testimony, the court said "I don't think I'll waste any more time on this case. Finding * * - - - - - - - -" Here the plaintiff interrupted, saying, "Just a moment. I want to take a non-suit in this case." The court then proceeded to formally announce his finding for the defendant. Section 30 of the Municipal Court Act provides that, "every person desirous of suffering a non-suit, shall be barred therefrom unless he do so before the jury retired from the bar or before the court, in case the trial is by the court without a jury, states its finding." The question, therefore, is, did the plaintiff move for a non-suit before the court had stated its finding. While it is true that the request for a non-suit was interposed before the court made formal announcement that the finding of the court was for the defendants, yet, it was not made before the court had stated, in substance, what the finding would be. The remark made by the trial judge, to the effect that he would not waste any more time on this case, when taken in the light of the testimony and other statements that had been made by the court previously, as shown by the record, amounted to a statement on the part of the court, in substance, as to what his finding would

It is urged that there must be a reversal of the finding of the trial court on the ground that the plaintiff was denied the right of taking a non-suit. After the plaintiff and one other witness testifying in his behalf had concluded their testimony, the plaintiff rested except as to one witness, who had not arrived in court and who was to testify as to the value of the items. Thereupon, one of the defendants took the stand and proceeded to testify. At the conclusion of his testimony, the court said "I don't think I'll waste any more time on this case. Finding * * - - - - - - -" Here the plaintiff interrupted, saying, "Just a moment. I want to take a non-suit in this case." The court then proceeded to formally announce his finding for the defendant. Section 30 of the Municipal Court Act provides that, "every person desirous of suffering a non-suit, shall be barred thereform unless he do so before the jury retired from the bar or before the court, in case the trial is by the court without a jury, states its finding." The question, therefore, is, did the plaintiff move for a non-suit before the court had stated its finding. While it is true that the request for a non-suit was interposed before the court made formal announcement that the finding of the court was for the defendants, yet, it was not made before the court had stated, in substance, what the finding would be. The remark made by the trial judge, to the effect that he would not waste any more time on this case, when taken in the light of the testimony and other statements that had been made by the court previously, as shown by the record, amounted to a statement on the part of the court, in substance, as to what his finding would

be. This is further indicated by the fact that the plaintiff, in his haste to secure a non-suit, interrupted the trial judge in the middle of his formal announcement of his finding. In our opinion, the motion for non-suit came too late. Yudelson v. Winterberg, 185 Ill. App. 454; Springer v. The Campbell Co., 174 Ill. App. 278, 282.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

be. This is further indicated by the fact that the plaintiff, in his haste to secure a non-suit, interrupted the trial judge in the middle of his formal announcement of his finding. In our opinion, the motion for non-suit came too late. Yudelson v. Kinderman, 185 Ill. App. 454; Burkhart v. The Campbell Co., 174 Ill. App. 278, 282.

Finding no error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

524 - 23869

RAFAEL PALAS,

Appellee,

vs.

HARVEY ROOM COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

211 I.A. 580

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, by which the plaintiff, Palas, sought to recover the sum of $140.00 delivered by him to the clerk of the defendant for safe keeping. A trial was had before the court without a jury. The defendant has appealed from a judgment for the plaintiff for the full amount claimed.

The defendant was an inn-keeper, and the plaintiff was its guest. It was not denied that the plaintiff deposited $140.00 with the defendant's clerk for safe keeping, and was given a receipt for the money by the clerk. When the plaintiff later requested his money, the clerk had disappeared. The president of the defendant company testified that the clerk was not authorized to receive or care for any sum of money in excess of $5.00. The evidence further showed that there was a sign upon the wall of the office of the hotel in question, reading, "Not responsible for valuables or money lost or stolen

326 - 13909

NATHAN NAIAS,

Appellee,

vs.

HARVEY HOUSE COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, by which the plaintiff, Naias, sought to recover the sum of $140.00 delivered by him to the clerk of the defendant for safe keeping. A trial was had before the court without a jury. The defendant has appealed from a judgment for the plaintiff for the full amount claimed.

The defendant was an inn-keeper, and the plaintiff was its guest. It was not denied that the plaintiff deposited $140.00 with the defendant's clerk for safe keeping, and was given a receipt for the money by the clerk. When the plaintiff later requested his money, the clerk had disappeared. The president of the defendant company testified that the clerk was not authorized to receive or care for any sum of money in excess of $5.00. The evidence further showed that there was a sign upon the wall of the office of the hotel in question, reading, "Not responsible for valuables or money lost or stolen

in its premises beyond the value of $5.00." The only question presented by this appeal relates to the possibility of an innkeeper limiting his liability by the posting of such a notice as the one above quoted.

Where the guest of an innkeeper deposits money for safe keeping with the clerk of the innkeeper, and the latter absconds with it, the innkeeper will be liable. Zimmerman v. Murphy, 131 Ill. App. 56; Hardcastle v. Ryder, 175 Ill. App. 430. The innkeeper may, by notice, require the guest to conform to reasonable rules. 22 Cyc. 1083 Van Wyck v. Howard, 12 Howard's Practice 147, 150. But except as provided by our Statute, the innkeeper may not limit his legal liability by the mere posting of a notice. The guest of an innkeeper has a right to assume that a clerk in the innkeeper's employ, having charge of the office, is one with whom he may properly leave money for safe keeping, at least up to a reasonable amount. Where a guest does leave money with an innkeeper's clerk for safe keeping, and the clerk steals it, the law makes the innkeeper liable for the loss. To successfully limit that liability in amount, as the innkeeper sought to do in the case at bar by the posting of a notice, it would not only be necessary that that notice be clear and explicit, but it would further be necessary for the innkeeper to show that he brought the notice home to the knowledge of the guest so that when the relation of innkeeper and guest was entered into, it was with knowledge on the part of the guest of the limitation of liability on the part of the innkeeper, that limitation thus becoming a part of the contract entered into by the parties, when the relationship was entered

in its premises beyond the value of $8.00." The only question presented by this appeal relates to the possibility of an innkeeper limiting his liability by the posting of such a notice as the one above quoted.

Where the guest of an innkeeper deposits money for safe keeping with the clerk of the innkeeper, and the latter absconds with it, the innkeeper will be liable. Zimmerman v. Murphy, 153 Ill. App. 56; Hardcastle v. Hyder, 175 Ill. App. 430. The innkeeper may, by notice, require the guest to conform to reasonable rules. 32 Cyc. 1083 Van Wyck v. Howard, 12 Howard's Practice 147, 150. Not except as provided by our Statute, the innkeeper may not limit his legal liability by the mere posting of a notice. The guest of an innkeeper has a right to assume that a clerk in the innkeeper's employ, having charge of the office, is one with whom he may properly leave money for safe keeping, at least up to a reasonable amount. Where a guest does leave money with an innkeeper's clerk for safe keeping, and the clerk steals it, the law makes the innkeeper liable for the loss. To successfully limit that liability in amount, as the innkeeper sought to do in the case at bar by the posting of a notice, it would not only be necessary that that notice be clear and explicit, but it would further be necessary for the innkeeper to show that he brought the notice home to the knowledge of the guest so that when the relation of innkeeper and guest was entered into, it was with knowledge on the part of the guest of the limitation of liability on the part of the innkeeper, that limitation thus becoming a part of the contract entered into by the parties, when the relationship was entered

into.

The notice involved in the case at bar was far from clear. Assuming that the guest could read it and that he did read it, he might well assume that by it, the innkeeper sought to limit his liability in case of the theft of money or valuables lost in the hotel or stolen by other guests, and that it, in no way, referred to the theft of money or valuables by the innkeeper's own servants.

Further, it not only does not appear that the plaintiff knew of this rule and assented to it, but the contrary is apparent from the fact that the testimony shows the plaintiff was a foreigner and could not read English. Both because the rule was not clear and explicit, and because its provisions were not brought home to the knowledge of the plaintiff, it failed to affect the innkeeper's liability under the law, and there was, therefore, no error in finding the issues for the plaintiff, and therefore, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

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The notice involved in the case at bar was far from clear. Assuming that the guest could read it and that he did read it, he might well assume that by it, the innkeeper sought to limit his liability in case of the theft of money or valuables lost in the hotel or stolen by other guests, and that it, in no way, referred to the theft of money or valuables by the innkeeper's own servants.

Further, it not only does not appear that the plaintiff knew of this rule and assented to it, but the contrary is apparent from the fact that the testimony shows the plaintiff was a foreigner and could not read English. Both because the rule was not clear and explicit, and because its provisions were not brought home to the knowledge of the plaintiff, it failed to effect the innkeeper's liability under the law, and there was, therefore, no error in finding the issues for the plaintiff, and therefore, the judgment of the municipal court will be affirmed.

Per Curiam.

536 - 23381

WALTER J. ELLIS,

Appellee,

vs.

HILLISON AND ETTEN COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

211 I.A. 581

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, by which the plaintiff sought to recover the sum of $105.00 under an alleged contract between himself and the defendant company. There was a trial before the court without a jury, after which, the court found the issues for the plaintiff and entered judgment for the sum of $106.00, from which judgment, the defendant has appealed.

The contract which in the basis of this suit, reads as follows:

> "To Walter J. Ellis January 26, 1917.
> Please give our staff a Demonstration of your 'New Method' Embossing which, if it is as you claim, we will purchase at $105.00 (on Sat.week) 12 o'clock.
>
> Hillison & Etten Co.,
> Harry Hillison."

The defendant claims that this is not a contract, but a counter offer on his part, to plaintiff's original offer, which was to sell the defendant the right to use the process in question for the sum named. While the defendant did not accept the plaintiff's original offer, and made the counter-

550 - 32891

WALTER J. MILLS,

Appellee,

vs.

HILLSON AND NETTER COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, by which the plaintiff sought to recover the sum of $108.00 under an alleged contract between himself and the defendant company. There was a trial before the court without a jury, after which, the court found the issues for the plaintiff and entered judgment for the sum of $108.00, from which judgment, the defendant has appealed.

The contract which is the basis of this suit, reads as follows:

"To Walter J. Mills January 22, 1917.
Please give our staff a demonstration of your 'New Method' Mahogany White, if it is as you claim, we will purchase at $108.00 (on est.week) 12 o'clock.

Hillson & Netter Co.,
Henry Hillson."

The defendant claims that this is not a contract, but a counter offer on his part, to plaintiff's original offer, which was to sell the defendant the right to use the process in question for the sum named. While the defendant did not

proposition contained in the writing quoted above, that writing constituted an outstanding offer which ripened into a binding obligation as soon as the plaintiff made the demonstration called for and it proved as he had claimed. The evidence shows that the plaintiff did make the demonstration called for in the contract and, while the evidence is conflicting, we cannot say from the record that it did not warrant the finding of the trial court, to the effect that the process as thus demonstrated was satisfactory to the defendant and fulfilled the claims which the plaintiff had made. That finding, in our opinion, being warranted by the evidence, the plaintiff was entitled to recovery.

The defendant further contends that Harry Hillison who signed the contract, was not an officer of the corporation, but merely an employee, and that he had no authority, either express or implied, to sign the contract. We think the trial court was warranted in coming to the opposite conclusion from the evidence. The plaintiff testified that he called on the defendant for the purpose of selling it the right to use this patented process, and that he talked with Mr. M. E. Hillison, the president of the defendant company, telling him that he had a new process of embossing to sell, whereupon Hillison told him to see Mr. Harry Hillison and talk to him about it. This reply by the president of the company, in the light of his knowledge that the plaintiff was seeking to sell something to the company, was sufficient to clothe Harry Hillison with apparent authority to deal in the subject-matter on behalf of the corporation as its duly authorized agent. There is also some conflict in the testimony as to the original conversation between the plaintiff and M. E.

proposition contained in the writing quoted above, that writing constituted an enforceable offer which ripened into a binding obligation as soon as the plaintiff made the demonstration called for and it proved as he had claimed. The evidence shows that the plaintiff did make the demonstration called for in the contract and, while the evidence is conflicting, we cannot say from the record that it did not warrant the finding of the trial court, to the effect that the process as time tested was satisfactory to the defendant and fulfilled the claims upon the plaintiff had made. That finding, in our opinion, being supported by the evidence, the plaintiff was entitled to recovery.

The defendant further contends that Mr. Millison who signed the contract, was not an officer of the corporation, but merely an employee, and that he had no authority, either express or implied, to sign the contract. We think the trial court was warranted in coming to the opposite conclusion from the evidence. The plaintiff testified that he talked on the telephone for the purpose of calling it the right to use this patented process, and that he talked with Mr. W. Millison, the president of the defendant company, telling him that he had a new process of embossing to sell, whereupon Mr. Millison told him to see Mr. Perry. Mr. Perry then talk to him about it. This reply by the president of the company, in the light of his knowledge that the plaintiff was seeking to sell something to the company, was sufficient to clothe Mr. Millison with apparent authority to act in the subject-matter on behalf of the corporation as the duly authorized agent. There is also some conflict in the testimony as to the original conversation between the plaintiff and Mr. W.

Hillison, but as to that, it is also our opinion that the finding of the trial court was warranted by the testimony. He saw the several witnesses and heard them testify and was better able to judge of the proper weight of their testimony than we can be.

The defendant further contends that the plaintiff's statement of claim does not set forth a cause of action. Section 40 of the Municipal Court Act requires "A statement of the plaintiff's claim which statement, if the suit be on a contract, express or implied, shall consist of a statement of the account or of the nature of the demand * * *." As the statement of claim here involved included a copy of the contract sued on, and a statement to the effect, that after the contract was signed, the plaintiff demonstrated his method, and was informed by the defendant that it was satisfactory, it was sufficient. The Statute referred to, does not require that the statement of claim in a case of the fourth class in the Municipal Court shall set forth a cause of action with the particularity required by a common law pleading, but merely a statement of the account or nature of the demand sued on. Enberg v. City of Chicago, 271 Ill. 404, 409; C. I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill. App. 20; Kappen v. Bacon, Ill. App. First District case #23212, opinion filed December 28, 1917.

The statement of claim further set forth that the plaintiff's claim was upon an account stated and the testimony showed that after the plaintiff had made his demonstration, and had sent a bill for the amount specified in the contract, he called upon the defendant for a check on two different occasions, and at neither time,

Millikan, but as to that, it is also our opinion that the finding of the trial court was warranted by the testimony. He saw the several witnesses and heard them testify and was better able to judge of the proper weight of their testimony than we can be.

The defendant further contends that the plaintiff's statement of claim does not set forth a cause of action. Section 40 of the Municipal Court Act requires "A statement of the plaintiff's claim which statement, if the suit be on a contract, express or implied, shall consist of a statement of the account or of the nature of the demand * * *." As the statement of claim here involved included a copy of the contract sued on, and a statement to the effect, that after the contract was signed, the plaintiff demonstrated the method, and was informed by the defendant that it was satisfactory, it was sufficient. The statute referred to, does not require that the statement of claim in a case of the fourth class in the Municipal Court shall set forth a cause of action with the particularity required by a common law pleading, but merely a statement of the account or nature of the demand sued on. Ingersoll v. City of Chicago, 271 Ill. 464, 466; Z. L. & Ln. Ry. Co. v. Quantrell Lumber Co., 248 Ill. App. 20; Kessler v. Tucker, Ill. App. First District case #23815, opinion filed December 28, 1927.

The statement of claim further set forth that the plaintiff's claim was upon an account stated and the testimony showed that after the plaintiff had made his demonstration, and had sent a bill for the amount specified in the contract, he called upon the defendant for a check on two different occasions, and at neither time,

was payment refused, nor was any statement made to the effect that the process was not what he had claimed for it or unsatisfactory, but on the first occasion, he was told that the one who made out the checks was out, and he should return later, and on the second occasion, he was told by Harry Williams that the defendant did not care to pay for the process until they had made something out of it.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

was payment refused, nor was any statement made to the effect that the process was not what he had claimed for it or unsatisfactory, but on the first occasion, he was told that the one who made out the checks was out, and he should return later, and on the second occasion, he was told by Harry Williams that the defendant did not care to pay for the process until they had made something out of it.

Finding no error in the record, the judgment of the municipal Court is affirmed.

AFFIRMED.

285 - 23630

4278

EDSON R. GILBERT and WILLIAM H. DUNN,
Appellants,
vs.
ROBERT M. SWEITZER et al.,
Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

211 I.A. 583

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Since the judgment of the trial court was affirmed, appellants have filed a petition asking that the order of affirmance be vacated; that this court adjudge the appeal was taken to the wrong court and that an order be entered transferring the cause to the Supreme Court.

Our powers and duties in this regard are set forth in chapter 110, section 102, of the Practice Act.

In this case certain constitutional questions were presented which the appeal to this court waived. The record presented other questions proper to be decided by this court which were argued by the respective parties and upon the questions thus raised, we considered and decided the case and entered the order of affirmance. Petitioners asked and obtained the judgment of this court upon the merits of such questions, even though appellees' brief called their attention to the fact that this court could not entertain the constitutional questions raised and argued.

We do not understand the statute to direct a transfer of the cause in this condition of the record. If it does, litigants might speculate upon the probable decisions of this court without being bound thereby.

The petition will be denied.

DENIED.

285 - 25650

HERSON R. GILBERT and WILLIAM H. BUNN, Appellants, va. ROBERT M. SWEITZER et al., Appellees.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

Ill. App. 383

MR. JUSTICE FARMER DELIVERED THE OPINION OF THE COURT.

Since the judgment of the trial court was affirmed, appellants have filed a petition asking that the order of affirmance be vacated; that this court adjudge the appeal was taken to the wrong court and that an order be entered transferring the cause to the Supreme Court.

Our powers and duties in this regard are set forth in chapter 110, section 102, of the Practice Act.

In this case certain constitutional questions were presented which the appeal to this court waived. The record presented other questions proper to be decided by this court which were argued by the respective parties and upon the questions thus raised, we considered and decided the case and entered the order of affirmance. Petitioners asked and obtained the judgment of this court upon the merits of such questions, even though appellees' brief called their attention to the fact that this court could not entertain the constitutional questions raised and argued.

We do not understand the statute to direct a transfer of the cause in this condition of the record. If it does, litigants might speculate upon the probable decisions of this court without being bound thereby.

The petition will be denied.

DENIED.

43 - 23934

CHARLES E. HARDING,
Defendant in Error,

vs.

A. T. A FILLER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

211 I.A. 584

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Charles E. Harding, filed a bill of complaint in the Circuit Court of Cook County in which he alleged that for 25 years prior to March 29, 1915, he had been engaged in the live stock commission business at Union Stock Yards, Chicago, under the firm name of Charles E. Harding & Co.; that as the result of his labor and efforts he had built up a large and profitable business, which yielded him a yearly profit of about $25,000; that on March 29, 1915, the defendant Filler, a brother-in-law of complainant, was, and for upwards of 13 years had been, in the employ of complainant, and that he, Filler, had unreserved access to the books and records kept in said business and was a trusted employe of complainant; that on the 29th day of March, 1915, the Live Stock Exchange National Bank of Chicago, without authority appropriated to its own use $14,000 trust funds belonging to customers of complainant, deposited in said bank to the credit of complainant, and refused to pay certain checks drawn by complainant against said funds; that at this time Filler advised complainant to go to Texas, where the complainant owned certain real estate, and procure there sufficient funds to meet complainant's pressing requirements; and that he, Filler, would take charge of complainant's business and operate it until his return from Texas; that at this time Filler tendered a loan

CHARLES E. HARDING,
Defendant in error,

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

vs.

A. T. A WILLER,
Plaintiff in error.

MR. PRESIDING JUSTICE DUNNE
DELIVERED THE OPINION OF THE COURT.

The complainant, Charles E. Harding, filed a bill of complaint in the Circuit Court of Cook County in which he alleged that for 25 years prior to March 29, 1918, he had been engaged in the live stock commission business at Union Stock Yards, Chicago, under the firm name of Charles E. Harding & Co.; that as the result of his labor and efforts he had built up a large and profitable business, which yielded him a yearly profit of about $25,000; that on March 29, 1918, the defendant Willer, a brother-in-law of complainant, was, and for upwards of 13 years had been, in the employ of complainant, and that he, Willer, had unreserved access to the books and records kept in said business and was a trusted employe of complainant; that on the 29th day of March, 1918, the live Stock Exchange National Bank of Chicago, without authority appropriated to its own use $14,000 trust funds belonging to customers of complainant deposited in said bank to the credit of complainant, and refused to pay certain checks drawn by complainant against said funds; that at this time Willer advised complainant to go to Texas, where the complainant owned certain real estate, and procure there sufficient funds to meet complainant's pressing requirements; and that he, Willer, would take charge of complainant's business and operate it until his return from Texas; that at this time Willer tendered a loan

of $3,000 to complainant; that as a result of the suggestion of Filler, complainant, relying upon promises made by him, delivered to Filler a power of attorney to conduct complainant's business.

It is also alleged in the bill that the complainant thereupon opened a new account in the Drovers National Bank of Chicago with the money tendered him by Filler and $9,000 in addition thereto; all of which was turned over to Filler to enable him to conduct the business of complainant, together with about $6,000 in collectable notes then due complainant; that complainant proceeded to Texas, leaving Filler in sole charge of his business; that for some weeks thereafter Filler conducted the business on behalf of complainant, holding out to customers that he was acting for complainant; that on May 7, 1915, while complainant was in Texas, he, complainant, was suspended from membership in the Chicago Live Stock Exchange; that such suspension was brought about by the acts of Filler; that thereupon Filler organized the Filler Commission Co., holding out to customers of complainant that he, Filler, had succeeded to the business of complainant.

The bill further alleges that in the conduct of complainant's business Filler had procured profits of upwards of $50,000, which he refused to account for to complainant; that he, Filler, had collected various amounts on notes and assets of complainant for which he also failed to account; that Filler, in violation of his trust, had taken possession of the offices and live stock pens formerly possessed by complainant and that he had procured a lease to be executed to him of said premises by Union Stock Yards & Transit Co., the owners; that on the 9th day of February, 1916, Filler in-

owners; that on the 9th day of February, 1914, Miller informed him of said premises by Union Stock Yards & Transit Co., the plaintiff and that he had procured a lease to be executed to the offices and five store rooms formerly occupied by defendant Miller. In violation of his trust, and upon pretension of acts of complainant for which he was also failing to account; that Miller, in addition to his trust, had still other various amounts due and owing to complainant, which he refused to account for to complainant; that he, Miller, had still other various amounts due and owing of $80,000, which he refused to account for to complainant; that on, Miller, had procured a power of attorney to complainant's business Miller [illegible] procured profits of upwards of $80,000, which he refused to account for to complainant; that Miller, in violation of his trust, and upon pretension of acts of complainant for which he was also failing to account; that complainant thereupon opened a new account in the Drovers National Bank of Chicago with the money tendered him by Miller and $3,000 in addition thereto; all of which was turned over to Miller to enable him to conduct the business of complainant, together with about $6,000 in collectable notes then due complainant; that complainant proceeded to Texas, leaving Miller in sole charge of his business; that for some weeks thereafter Miller conducted the business on behalf of complainant, making out to customers that he was acting for complainant; that on July 7, 1915, while complainant was in Texas, he, complainant, was assaulted from ambush in the village [illegible] Stockyards; that soon afterwards was brought about by the [illegible] of Miller; that thereupon Miller organized the Miller Commission Co., holding out to customers of complainant that the Miller, has succeeded to the business of complainant.

The bill further alleges, in the conduct of complainant's business Miller [illegible] procured profits of upwards of $80,000, which he refused to account for to complainant;

stituted his suit against complainant to recover $9,087.79, which he claimed to be due him; that Filler, in fraud of complainant's rights, on July 5, 1916, filed in the office of the clerk of the Circuit court an affidavit for attachment in aid of said suit, in which affidavit Filler stated that complainant's place of residence was Dawn, Texas; that complainant had departed from this State with intention to remove his effects therefrom and with the intention to hinder, delay and defraud his creditors; that Filler well knew complainant had gone to Texas with no intention of residing there; or of removing his property from the State, or of defrauding his creditors; that under the attachment writ issued in said cause Filler caused a note to be attached and the proceeds thereof diverted; that Filler made repeated threats to his sister, complainant's wife, to attach the homestead of complainant in which his said wife was then residing; that Filler well knew while said lawsuit was pending that complainant during December, 1916, and January, 1917, was living at his usual place of residence in Chicago; that Filler caused personal service to be made of the writs issued in said cause during this time, on complainant; that thereafter, when complainant had returned to Texas, Filler caused said cause to be placed on the short cause calendar for trial.

It is further alleged in the bill that on an accounting it would be made to appear that Filler is indebted to complainant in a large sum for the profits of the business belonging to complainant and conducted by Filler, and which business Filler operated as trustee and agent for complainant; that the lessors in the lease referred to are willing and ready to cancel the same or to assign it to complainant; that Filler had sold certain office equipment

attested his suit against complainant to recover $9,087.79, which he claimed to be due him; that Miller, in fraud of complainant's rights, on July 5, 1916, filed in the office of the clerk of the circuit court an affidavit for attachment in aid of said suit, in which affidavit Miller stated that complainant's place of residence was Texas, Texas; that complainant had departed from this State with intention to remove his effects therefrom and with the intention to hinder, delay and defraud his creditors; that Miller well knew complainant had gone to Texas with no intention of residing there; or of removing his property from the State, or of defrauding his creditors; that under the attachment writ issued in said cause Miller caused a note to be attached and the proceeds thereof diverted; that Miller made repeated threats to his sister, complainant's wife, to attach the homestead of complainant in which his said wife was then residing; that Miller well knew while said lawsuit was pending that complainant during December, 1916, and January, 1917, was living at his usual place of residence in Chicago; that Miller caused personal service to be made of the writs issued in said cause during this time, on complainant; that thereafter, when complainant had returned to Texas, Miller caused said cause to be placed on the short cause calendar for trial.

It is further alleged in the bill that on an accounting it would be made to appear that Miller is indebted to complainant in a large sum for the profits of the business belonging to complainant and conducted by Miller, and which business Miller operated as trustee and agent for complainant; that the leases in the lease referred to are willing and ready to cancel the same or to assign it to complainant; that Miller had sold certain office equipment

and furnishings, the property of complainant, and that he refused to account for the proceeds thereof.

In his prayer to the bill the complainant seeks an accounting of the profits of the business conducted by Filler, and that he, Filler, may be decreed to hold said commission business and the proceeds and profits thereof, the offices and pens and the lease referred to in trust for complainant.

In a supplemental bill filed April, 1917, it is alleged that on April 10, 1917, complainant was reinstated to full membership on the Chicago Live Stock Exchange over the written protest of the defendant, Filler, this being the only written protest against the reinstatement of complainant. On answers filed the cause was referred to a master, who having heard the evidence introduced by the parties, found that the equities of the cause were with the complainant, and he recommended the entry of a decree in accordance with his findings, which are elaborately set forth in his report.

We have examined the evidence in the record and are inclined to the view that it fairly supports the findings and conclusions of the master. There can be small doubt on the evidence that Filler was a confidential and trusted employe of the complainant prior to March 29, 1915, when the financial troubles of complainant began by the appropriation of his cash balance in the Live Stock Exchange National Bank. The sum so appropriated was, in fact, a trust fund which the bank thereafter paid to certain shippers, the owners thereof. At the time of the appropriation of this fund the complainant was indebted to the bank for a large sum of money, but this indebtedness was well secured and the bank held in addition thereto security of the value of $30,000 for

and furnishings, the property of complainant, and that he refused to account for the proceeds thereof.

In his prayer to the bill the complainant seeks an accounting of the profits of the business conducted by Miller, and that he, Miller, may be decreed to hold said commission business and the proceeds and profits thereof, the offices and pens and the loans referred to in trust for complainant.

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We have examined the evidence in the record and are inclined to the view that it fairly supports the findings and conclusions of the master. There can be small doubt on the evidence that Miller was confidential and trusted employe of the complainant prior to March 24, 1915, when the financial troubles of complainant began by the appropriation of his cash balance in the Live Stock Exchange National Bank. The sum so appropriated was, in fact, a trust fund which the bank thereafter paid to certain auspexs, the owners thereof. At the time of the appropriation of this fund the complainant was indebted to the bank for a large sum of money, but this indebtedness was well secured and the bank held in addition thereto security of the value of $50,000 for

further advances, which the complainant says were to be made to him by the bank. Counsel for complainant intimate that litigation is now threatened with reference to the appropriation of the bank balance of complainant, and what we say here is not to be taken as any intimation on our part as to the rights of any persons with reference thereto. It is apparent, however, that Filler took advantage of the embarrassment which was caused complainant by the appropriation of this fund, and that with his, Filler's, knowledge and approval the complainant went to Texas to procure money to tide him over his difficulties.

The evidence discloses that the appropriation of complainant's bank balance caused his suspension as a member of the Live Stock Exchange. The president of this organization testified in effect that this suspension did not necessarily indicate any unethical conduct on the part of complainant; that it was the result of a rule of the organization which required the suspension of a member who had failed to meet his obligations to live stock shippers. It is conceded that on March 29, 1915, the complainant was unable to pay certain debts due shippers of stock. He has, however, since said date, provided for the payment of these obligations and he has been reinstated as a member of the Live Stock Exchange, notwithstanding the fact that defendant Filler, his brother-in-law and former trusted employe, was the only person who made written objection to his reinstatement.

The evidence further shows that prior to March 29, 1915, the business of Charles E. Harding & Co. was operated by complainant; that he owned all of the office fixtures and equipment referred to; and that under his lease with the Union Stock Yards & Transit Co. he had certain

further advances, which the complainant says were to be made to him by the bank. Counsel for complainant intimate that litigation is now threatened with reference to the appropriation of the bank balance of complainant, and what we say here is not to be taken as any intimation on our part as to the rights of any persons with reference thereto. It is apparent, however, that Miller took advantage of the embarrassment which was caused complainant by the appropriation of this fund, and that with his, Miller's, knowledge and approval the complainant went to Texas to procure money to tide him over his difficulties.

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The evidence further shows that prior to March 29, 1915, the business of Charles E. Harding & Co. was operated by complainant; that he owned all of the office furniture and equipment referred to; and that under his lease with the Union Stock Yards & Transit Co. he had certain

valuable privileges as to the use of cattle, sheep and hog pens in the Union Stock Yards.

The master found, and we think properly so, that Charles E. Harding had a good reputation as a commission man prior to March 29, 1915; that he had been doing a large and profitable business, which was the result of his integrity and his ability. About 95% of the persons with whom Filler did business in May, 1915, were former customers of complainant.

On March 29, 1915, the complainant was the owner of large tracts of land in Texas and certain real estate in Chicago and Wisconsin, and he also possessed personal assets of considerable value. His total indebtedness at this time amounted to $251,000. On March 30, 1915, he opened an account in the Drovers National Bank in the name of Chas. E. Harding & Co., and at the same time he opened another account in the same bank in the name of the defendant Filler. Complainant at this time by power of attorney authorized Filler and one McCann to sign checks against his account.

Certain letters are contained in the record signed by one Thayer, who was, the evidence shows, the agent of Filler after complainant went to Texas. While it is not conceded that Thayer had the authority to bind the defendant by his statements in these letters, we think it appears from the admissions of the defendant himself and from other evidence that Thayer was acting for Filler in the correspondence with complainant. These letters are voluminous and can not be quoted here at great length. As an instance of their general tenor, however, it appears that on May 8, 1915, Thayer at the direction of Filler sent a letter to complainant informing him of his suspension by the Live Stock Exchange; a part of this letter is as follows:

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"Of course for the present that puts you out of the running. It became necessary to do something and do it quick or abandon the business altogether. We immediately organized a new firm called the Filler Commission Co., and have taken the business over and will do the best we can do with it until such a time as you want to do something for yourself and then you can settle with Mr. Filler. * * *

"I think at the earliest possible moment after you have the arrangements made and papers signed you should come home at once, and assist in taking care of the tangled matters you left."

It is a significant fact that even though Filler for some weeks following March 29, 1915, was concededly acting for the complainant in Chicago, he saw fit to correspond with complainant through Thayer.

The theory of the defense is that Filler organized a new business on May 8, 1915, and he denies that he took possession of any property or assets of the complainant excepting certain office furniture.

On the whole evidence it is apparent that Filler in many ways which were disloyal got possession of complainant's property and business. The attachment suit referred to was based upon an affidavit which we think the evidence shows was false in important particulars; the defendant made use of the power of attorney given to him by complainant just before he went to Texas, to aid him in getting possession of complainant's business and property. He made certain representations to the lessors of the premises occupied by complainant to the effect that he was authorized by this power of attorney to accept an assignment of the lease of the premises to himself, and it is evident that the defendant in many ways which cannot be referred to here deliberately sought to strip the complainant of the property and business which came into his possession as the agent of complainant.

When consideration is given to the inherent nature of the business conducted by complainant and the cir-

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When consideration is given to the inherent nature of the business conducted by complainant and the cir-

cumstances which surrounded the parties on March 29, 1915, it becomes almost certain that the complainant, who was a business man of ability, would not consent to permit Filler to appropriate to his own use his, complainant's, business and take possession of his property under the conceded circumstances of the case.

Under the rules of the Live Stock Exchange a suspended member was permitted to handle his live stock commission business pending reinstatement through any member of the exchange in good standing, and under this rule complainant would be entitled to 50% of the net commissions derived from the sale of stock consigned to him.

It is admitted that the defendant, Filler, acted as complainant's agent between March 29, 1915, and May 8, 1915. The evidence shows that on the latter date Filler had in his possession and control the records, books of account, fixtures, bank balance and other property of complainant, including the good will of the business. It is insisted on behalf of the defendant that his agency for complainant ceased on May 8, 1915. The letter of May 8th, hereinbefore quoted from, which was written to complainant by direction of defendant, did not inform complainant of the alleged purpose of defendant in organizing the Filler Commission Company. In this letter Thayer informed Harding of his suspension and therein he said, "It became necessary to do something and do it quick, or abandon the business altogether." This letter clearly was intended to lead complainant to believe that the organization of the Filler Commission Co. was for the purpose of saving the business then owned by complainant and of preserving it until such time as the complainant could give his personal attention to it.

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Again the evidence tends to show that on May 8, 1915, the defendant directed the Drovers National Bank to pay all outstanding checks of C. E. Harding & Co. out of his personal account with the bank, over 90% of which account represented deposits, the proceeds of live stock sold by Chas. E. Harding & Co. The Filler Commission Company's bank balance was made up of a certificate of deposit of $13,619.55, which sum represented proceeds of stock sold by Chas. E. Harding & Co. for shippers, a check drawn by Filler against bank balance of $40.89 to the credit of Chas. E. Harding & Co. and the sum of $1,088.78, individual property of complainant.

Notwithstanding the claim of defendant that his agency for complainant ceased on May 8, 1915, he paid thereafter certain bills incurred on behalf of complainant prior to May 8, 1915. The evidence is conslusive that the defendant took possession of complainant's business on May 7, 1915, the day that complainant was suspended from the Live Stock Exchange. On the same day a circular on the letterhead of Chas. E. Harding & Co. was mailed by the Filler Commission Co. to the customers of complainant, a mailing list, the property of complainant, being used for this purpose. This circular announced that the Filler Commission Company had purchased the good will, offices and location of the firm of Chas. E. Harding & Co., and that the business was to be conducted in the name of Filler Commission Company. Complainant did not authorize the circular nor had he sold his property and business to defendant.

The record made on the trial of this case is very long and in our examination of the evidence we have been compelled to examine an abstract of record containing 249 pages and an additional abstract filed for complainant of 248 pages. We cannot, as stated, refer here to all of

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Notwithstanding the claim of defendant that his agency for complainant ceased on May 8, 1915, he said thereafter certain bills incurred on behalf of complainant prior to May 8, 1915. The evidence is conclusive that the defendant took possession of complainant's business on May 7, 1915, the day that complainant was suspended from the Live Stock Exchange. On the same day a circular on the letterhead of Chase, E. Harding & Co. was mailed by the Miller Commission Co. to the customers of complainant, a mailing list, the property of complainant, being used for this purpose. This circular announced that the Miller Commission Company had purchased the good will, offices and location of the firm of Chase, E. Harding & Co., and that the business was to be conducted in the name of Miller Commission Company. Complainant did not authorize the circular nor had he sold his property and business to defendant.

The record made on the trial of this case is very long and in our examination of the evidence we have been compelled to examine an abstract of record containing 249 pages and an additional abstract filed for complainant of 248 pages. We cannot, as stated, refer here to all of

the evidence shown by this long record. The evidence does indicate that complainant was not dishonest; that he did not intend or attempt to defraud his creditors; that defendant on March 29, 1915, as a consequence of his own suggestions became a trustee of the property and business of complainant, and that his, defendant's, subsequent conduct amounted to a breach of his duty as such trustee.

The report of the master was approved by the court in all respects, except that interest was allowed complainant on the amount found due him from March 1, 1917, only. The theory of the chancellor was that Filler by his conduct and appropriation of the property and interests of complainant was guilty of constructive fraud only. It is our opinion that the evidence shows that the conduct of Filler constitutes actual fraud.

It should be kept in mind that this is a suit between the complainant and one whom he charges as the actual wrongdoer. It is not, on the record, an action between an injured party and an innocent third person who claims title through a wrongdoer.

Some of the authorities relied upon by defendant emphasize the principle that one who neglects promptly to disavow an unauthorized act of his agent makes the act his own. This principle is readily applied in cases involving the rights of an innocent third person. It should not be applied, however, too rigorously where a party complainant seeks relief directly against an agent for injuries resulting from such agent's fraudulent, disloyal and secretive conduct. Vorhees v. Campbell, 275 Ill. 292.

Much complaint is made of the ruling which denied defendant the privilege of amending his answer after

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It should be kept in mind that this is a suit between the complainant and one whom he charges as the actual wrongdoer. It is not, on the record, an action between an injured party and an innocent third person who claims title through a wrongdoer.

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Such complaint is made of the ruling which denied defendant the privilege of amending his answer after

much evidence had been taken in the case. We do not think the court erred in this particular. Drew v. Drew, 271 Ill. 239.

In the answer filed by Filler to the bill of complaint he denied that he had appropriated to his own use complainant's business and property and he, defendant, alleged that the Filler Commission Company's business had no connection with the business conducted by complainant. After the master had prepared his report in the case an effort was made by defendant to amend his answer so as to let in proof that complainant had ratified and acquiesced in the acts and conduct of defendant which complainant complained of. We think the attempt to amend the answer came too late. The answer filed by defendant simply denied the acts complained of, and we think there was no abuse of discretion by the trial court in refusing to permit the defendant to avoid the consequences of acts which the evidence shows he committed, Fidman v. Bowman, 58 Ill. 444 at 449; Vorhees v. Campbell, supra; Crone v. Crone, 180 Ill. 599 at 604-605. Claim is not made that the complainant expressly ratified or acquiesced in the conduct of defendant, and from all the evidence heard by the master it satisfactorily appears that he did not in any other manner acquiesce in or ratify such conduct.

The decree of the Circuit court will be reversed with directions to enter a decree in accordance with the report of the master; the costs of the additional abstract will be taxed as costs in the cause and the plaintiff in error will pay the costs here and in the trial court.

DECREE REVERSED WITH DIRECTIONS.

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The decree of the circuit court will be reversed with directions to enter a decree in accordance with the report of the master; the costs of the additional abstract will be taxed as costs in the cause and the plaintiff in error will pay the costs here and in the trial court.

REVERSED WITH DIRECTIONS.

6473

43

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

211 I.A. 586

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6473.

The People of the State of Illinois

Defendant in error.

vs Error to Co. Ct. Boone.

Neely Clark, Plaintiff in error.

Dibell, P. J.

An information was filed in the County Court of Boone County against Neely Clark, containing forty counts. The last count was withdrawn before the end of the trial and defendant was convicted under the first thirty nine counts, each of which charged the unlawful sale of intoxicating liquor in anti-saloon territory. A judgment of fine and imprisonment was entered and that judgment is brought in review by this writ of error.

The case was submitted at the October Term, 1917. We found that the information was not verified. We continued the cause, and received further briefs from counsel upon the question of the effect of that lack of verification, and again took the cause at the April term, 1918. The constitutional rights of Clark were violated by his prosecution upon an information not supported by a sworn complainy or affidavit. People v Clark 280 Ill. 160; People v Hohaker, 281 Ill. 295. That error can be waived and it is waived if the question is not raised in the trial court. It can be raised by motion to quash, by motion in arrest, and apparently even by a motion for a new trial. No motion to quash the information was made in this case. There was a motion for a new trial, but it was solely on the points stated in a written motion and these points did not in any way suggest that the information was not verified. There was a motion in arrest of judgment. but it was expressly limited to the same written points

Gen. No. 6172.

The People of the State of Illinois

Defendant in error.

vs. Error to C. Co. Bond.

Neely Clark, Plaintiff in error.

Dibell, P. J.

An information was filed in the Bureau County Court of Illinois against Neely Clark, charging [illegible] county court. The [illegible] court was withdrawn before [illegible] of the trial [illegible] convicted upon the first [illegible] counts, and [illegible] charged the unlawful sale of [illegible] liquor in [illegible] territory. A jury [illegible] the information [illegible] and that judgment [illegible] in violation of [illegible] of error.

The case was submitted at the October term, 1917. We found that the information was not vexatious. [illegible] cause, and a motion further [illegible] of the quantity of the offense [illegible] lack of [illegible] cause at the April term, 1917. The constitutional rights of Clark were violated by his conviction [illegible] by a sworn complaint or affidavit. People v. [illegible] 111 Ill. 119; People v. Hoskins, 171 Ill. [illegible] it is waived in the [illegible] It can be [illegible] apparently [illegible] the information [illegible] new trial, [illegible] motion [illegible] formation was not [illegible] ment, but it [illegible]

filed in support of the motion for a new trial. That a motion in arrest may be so lomited appears to be held in Cummings v People 211 Ill. 393, on p. 402. Again, it does not seem to be raised in this court by an assignment of error. At the April term 1918, we gave plaintiffin error leave to assign an additional error raising this question, but we are unable to find that he did assign error upon the record, pursuant to that leave. It has many times been held that the court can consider no errors except such as are assigned upon the record, and that obtaining leave to assign an additional error or filing with the papers an assignment of error does not amount to an assignment of error on the record. We therefore do not need to consider the further contention of the People that the question could onyl be raised by a writ of error sued out from the supreme court to the trial court.

The place where it is claimed the law was violated is the second story of the Powers Building at 423 South State Street, in Belvidere, which was admitted to be anti-saloon territory, being the same building the first story of which has recently been before this court and the supreme court in the People v Powers (_____Ill. App. _____. 283 Ill. 438.) The back yard of the building is inclosed by a high board fence and is entered through a gate. There is then an inclosed stairway to the second story, with a door at the bottom and another upstairs which are kept locked and the person entering must have a key. The principal evidence for the people was that of two detectives employed by the Anti-Saloon League, named Fred and Edward Armstrong. Fred Armstrong obtained a key to this room in another city and had a duplicate

filed in support of the motion for a new trial. That motion in arrest may be so limited appears to be held in Cummings v People 213 Ill. 382, on p. 402. Again, it does not seem to be raised in this court by an assignment of error. At the April term 1912, we gave plaintiffs in error leave to assign an additional error raising this question, but we are unable to find that he did assign error upon the record, pursuant to that leave. It has many times been held that the court can consider no errors except such as are assigned upon the record, and that obtaining leave to assign an additional error or filing with the papers an assignment of error does not amount to an assignment of error on the record. We therefore do not deem it necessary to consider the further contention of the People that the question could only be raised by a writ of error sued out from the supreme court to the trial court.

The place where it is claimed the law was violated is the second story of the Powers Building at 412 South State Street, in Belvidere, which was admitted to be anti-saloon territory, being the one building the first story of which has recently been before this court and the supreme court in the People v Powers (_____Ill. App. ____. 232 Ill. 432.) The back part of the building is inclosed by a high board fence and is entered through a gate. There is then an inclosed stairway to the second story, with a door at the bottom and another upstairs which are kept locked and the person entering must have a key. The principal evidence for the people was that of two detectives employed by the Anti-Saloon League, named Tret and Elwert Armstrong. Tret upstairs obtained a key to this room in another city and had a duplicate

made for his brother. According to the proof for the People Fred went up first. met several men and among them Robert Sharp He asked Sharp who was the proprietor and Shawreplied that Clark was, (pointing to plaintiff in error, who was near by,) but that he, Sharp, was helping out the old man, who was not very well. Part of the proof for the People was that this was within hearing of Clark, and part that it was not. Fred bought liquor of Sharp in the presence of Clark and paid Sharp for it. Fred then asked if he might bring up a friend, and that being permitted he went and brought up his brother. They each bought further drinks of Sharp in the presence of Clark, and Sharp testified that he paid the monty to Clark at the end of the day. Thereafter the two detectives attended there for several days at different times and bought whiskey and beer from Clark and from Sharp and paid therefor. As we understand it, their testimony is positive as to buying more than thirty nine such drinks and paying either Clark or Sharp therefor. They also saw a number of drinks sold to other parties and paid for, which appeared to be in the same kind of receptacles as those from which they had obtained beer or whiskey. Clark denied that he had ever seen these detectives there or had ever sold them or any one else any liquor there, and denied that Sharp was his employe or servant. There were not thirty nine sales proven to have been made by Clark.
If the jury believed the evidence for the people, Sharp sold liquor there in the presence of Clark and turned over the money to Clark and we think this sufficient proof that he was acting for Clark. The mayor testified that before this place was opened Clark came to him and said that he was going to start a locker club; that he was unable to do hard work and this would give him a chance to earn a living. This evidence tended to show

made for his brother. According to the verdict for the people
Fred went up first. Met several men along then Robert Sharp
he asked Sharp who was the proprietor and Sharp replied that Clark
was, (pointing to plaintiff in error, who was near by.) But that
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opened Clark door to him and [illegible] to
locker club; that he was unable to find work and [illegible]
give him a chance to earn a living. This [illegible] know

him the ~~xxxxxxxxx~~ responsible head of the institution. The main defense was that these premises in the second story were occupied by The Sons of DeKalb, a club having a charter from the State of Illinois. It provided for a membership, each one of whom had a key to the building and owned a locker in which he kept beer or whiskey solely for his own individual use. Clark was the steward of that club and in charge of it. The beer was almost entirely that of the Aurora Brewing Company and delivered by the Fox River Express Company, and the whole scheme was substantially that described by us in People v Gilmore, 196 Ill. App. 148. See the same case in 273 Ill. 143. A bookkeeper of the Aurora Brewing Company was a witness for defendant and his testimony showed an intimate connection between the brewing company and this club. The court permitted much evidence for Clark as to the organization and management of the club, but did restrict that proof to some extent. If the question were whether the club had violated the law, it may be that the proof on that subject was unduly restricted. It was evidently the view of the trial court that the guilt or innocence of Clark under the proof did not involve the question whether the club had violated the law, and in this we hold that the court was correct. The proof introduced by Clark showed that frequently the locker would not hold all the beer and whiskey that a member had ordered, and that in such case, after the member's locker was filled, the rest was put into a certain room of which the steward had charge. If this was true, then it was from that surplus stock that sales were made by Clark and by Sharp. If Clark sold such beer and whiskey and received pay for it, he is just as guilty of violating the law as if there had been no club, and it was immaterial how the business was conducted with the members of the club. The jury and the trial

him the xxxxxxxxx responsibility of the liquidation. The main defense was that these premises in the second story were occupied by The Sons of Dekalb, a club having a charter from the State of Illinois. It provided for membership, each one of whom had a key to the building and owned a locker in which he kept beer or whiskey solely for his own individual use. Clark was the steward of that club and in charge of it. The beer was almost entirely that of the Aurora Brewing Company and delivered by the Fox River Express Company, and the whole scheme was substantially that described by us in People v Gilmore, 198 Ill. App. 146. See the case cited in 270 Ill. 143. A bookkeeper of the Aurora Brewing Company was a witness for defendant and his testimony showed an illicit connection between the brewing company and this club. The court permitted the witness for Clark as to the organization and management of the club, but did exclude that proof to which we object. If the question were whether the club had violated the law, we say on that the proof on that subject was unduly restricted. It was plainly the view of the trial court that the guilt or innocence of Clark under the proof did not involve the question whether the club had violated the law, and in that we hold the court was correct. The proof introduced by Clark tended to show frequently the lockers could not hold all the beer in the building that the member had ordered, and that in such case, after the member's locker was filled, the beer was put into a vault in room on the the steward has charge. If this was true, then it was true that burglars stole that beer which were found in Clark's locker. If Clark sold such beer and violated the law, he is just as guilty of violating the law as if there had been no club, and it was immaterial for the prosecution to conduct with the members of the club. The jury in this case

judge believed the witnesses for the People and if their evidence is true, Clark was properly found guilty.

The People did not call Sharp till rebuttal, and he testified to some matters that should have been offered in chief. He was competent in rebuttal in certain matters, and we are not disposed to hold that it was reversible error in this case to permit him to testify for the People to that which properly should have been introduced in chief. Sharp was an accomplice, and defendant requested an instruction that the jury could not convict on the evidence of an accomplice alone. The court refused the instruction. It was taken substantially word for word from Hoyt v People 140 Ill. 588. If conviction had been sought upon the evidence of Sharp alone, the instruction should have been given. The conviction was chiefly upon the evidence of the two detectives, and we think this instruction was properly refused because it tended to indicate to the jury that the conviction was sought on the evidence of Sharp alone. In the Hoyt case the conviction was sought mainly on the evidence of accomplices. The newly discovered evidence presented under the motion for a new trial was cumulative only and not conclusive

The court imposed a separate judgment under each count the net result of which was imprisonment in the county jail for 240 days and fines aggregating $2,950. and defendant was ordered to pay the costs and it was ordered that if, at the end of the jail sentence, the fine and costs are not paid, Clark should stand committed to the county jail till such fine and costs are paid at the rate of $1.50 per day. The amount of the costs is not shown, but is stated in Clark's brief to be $700. Omitting the costs, the total imprisonment under this judgment if Clark should be unable to pay the fine and costs, would be over six years. He was sixty five years old when tried. The evidence

judge believed the witnesses for the Peoples and if their evidence is true, Clark was [illegible] guilty.

The People did not call a [illegible] witness, [illegible] to some matters that should have been [illegible] competent in [illegible] to hold that [illegible] him to testify for the People [illegible] have been introduced in chief. [illegible] defendant requested an instruction [illegible] on the evidence of an accomplice alone. [illegible] instruction. It [illegible] v People 140 Ill. 592. If [illegible] evidence of Sarp [illegible] given. The conviction was [illegible] defectives, [illegible] because it [illegible] sought on [illegible] conviction was [illegible] The newly discovered evidence [illegible] new trial was [illegible]

The court [illegible] the net results of [illegible] 340 days [illegible] to pay the [illegible] jail sentence. [illegible] state commission [illegible] paid it the [illegible] is not shown, but [illegible] Omitting the [illegible] if Clark should be [illegible] six years. He was [illegible]

tends to show that he is in poor health and not a man of means. This amounts very nearly to life imprisonment for a mere misdemeanor, and that for a first offence so far as this record shows, and it is based almost entirely upon the evidence of two detectives. If many other people bought liquor there, the detectives did not name them and the People did not call them as witnesses. It seems to us that the ends of justice do not require the infliction of so severe a penalty. We think it can be truly said of this punishment that it "is so wholly disproportioned to the offense committed as to shock the moral sense of the community," as expressed in People v State Reformatory. 148 Ill. 413, on p. 421, and in City of Arcola v Wilkinson 233 Ill. 250, on p. 254. In People v Elliott 372 Ill. 592, (a case like this) the court there said, on p. 602, "We regard the sentences as unnecessarily severe for the accomplishment of the purposes of the law." That language seems to us to apply to this case. The State denies that we have any power to interfere with the amount of the punishment. The jury did not fix the penalty. The contention of the State is that if the trial judge inflicts the severest penalty provided by law, where the offense is of the mildest character possible, no other tribunal can interfere with the severity of the sentence. In a civil case that question can be reviewed by the Appellate Court and we think that power of review ought to be lodged somewhere. We did assume the authority to correct an excessive judgment in People v ~~Said~~ McCanney, 205 Ill. App. 91, and thinkxit proper to apply that rule in this case.

We reverse the fines imposed under counts No. 1 to 30 inclusive, and so modify the order, that if the costs are not paid defendant shall stand committed to the county jail till

tends to show that he is in poor health and not a man of means. This amounts very nearly to life imprisonment for a mere misdemeanor, and that for a first offence so far as this record shows, and it is based almost entirely upon the evidence of two detectives. If many other people bought liquor there, the detectives did not make them and the people did not call them as witnesses. It seems to us that the ends of justice do not require the infliction of so severe a penalty. We think it can be truly said of this punishment that it is so wholly disproportionate to the offence committed as to shock the moral sense of the community," as expressed in People v State Reformatory, 168 Ill. 16, on p. 44, and City of Anacle Hutchinson 238 Ill. 386, on p. 394. In [illegible] 6th Ill. 600, (a case like this) the court [illegible], on p. [illegible] "The argument the sentence is unnecessarily severe for the mere gratification of the purposes of the law." It is hard for us to apply to this case. The state tenaciously [illegible] to interfere with the amount of the punishment. [illegible] the penalty. The constitution of the State is that [illegible] judge inflicts the severest penalty provided by law, where the offence is of the slightest character and [illegible], no other tribunal can interfere with the severity of his sentence. In a civil case that question can be reviewed by the Appellate Court and we think that power of review ought to [illegible] where the [illegible] authority to [illegible] People v Reed Mechanic, 205 Ill. App. 5, [illegible] apply that rule in this case.

We reverse the fines imposed upon the [illegible] and so modify the order that upon [illegible] paid defendant shall stand committed to the county jail [illegible]

said costs are paid at the rate of $1.50 per day, that said order shall not apply to the costs made by and taxed against the defendant. In all other respects the judgment is affirmed.

Reversed in part and affirmed in part.

said costs are paid at the rate of $[illegible].00 per day. But such order shall not apply to the costs made by the terms against the defendant. In all other respects the judgment is affirmed.

Reversed in part and affirmed in part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6554

4304

AT A TERM OF THE APPELLATE COURT, 211 I.A. 605

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6554.

Samuel H. Potter, appellee

vs Appeal from Iroquois.

C. C. C. &St. L. Ry. Co.

appellant.

Dibell, P. J.

During the night following December 27, 1915, a number of horses owned by Samuel H. Potter got through a gate ina right of way fence maintained by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and two of them were killed by a freight train. In the following November Potter brought this suit against the railway company to recover the value of the horses so killed and filed a declaration, which besides stating the facts which made it the duty of the railway company to maintain the gate and fence, alleged that said fences were not suitable and sufficient to prevent horses from getting upon the railroad, and that the gate was not suitable and sufficient for that purpose; and the consequent escape and killing of the horses. Defendant filed the general issue, the cause was tried without a jury and there was finding and a judgment for plaintiff for $500.00 from which judgment defendant appeals. It is not contended that the judgment is excessive, if plaintiff is entitled to recover.

The gate was of the type known as a slide gate, as distinguished from a gate hung on ordinary hinges. There was an upright piece near each end and a top board and a bottom board nailed to each upright, and another board extending from the foot of the opening part of the gate at the bottom to the top board at the other end. The proof tended to show that it was so put on that it had no value as a brace. Wire netting was nailed over this frame. At the opening end were two posts a few inches

Gen. No. 6554.

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vs. Appeal from Iroquois.

C. C. C. & St. L. Ry. Co.

Appellant.

Dibell, P. J.

During the night following December 27, 1915, a number of horses owned by Samuel H. Potter got through a gate in the right of way fence maintained by the Chicago Junction, Cincinnati, Chicago & St. Louis Railway Company and two of them were killed by a freight train. In the following November Potter brought this suit against the railway company to recover the value of the horses so killed and filed a declaration, which had as attaching the facts which, if it be the duty of the railway company to maintain the gate and fence, alleged that said fences were not suitable and sufficient to prevent horses from getting upon the railroad, and that the gate was not suitable and sufficient for that purpose; and the consequent escape and killing of the horses. Defendant filed the general issue, the cause was tried without a jury and there was finding and a judgment for plaintiff for $500.00 from which judgment defendant appeals. It is not contended that the judgment is excessive, if plaintiff is entitled to recover.

The gate is of what is known as a lift gate, distinguished from a gate hung on railway hinges. There are upright posts near each end and one to which are attached, or affixed to each upright, and rather board extending from the foot of the crossing part of the gate at the left on to the top board at the other end. The proof tended to show that the C put on that it had no valve as a brace. There swinging and lifted over this frame. At the crossing and were two posts

apart and a cleat was nailed across these, perhaps four feet from the ground, and the top board extended a few inches beyond the upright part thereof and the gate was closed by placing this projected part of the top board over said cleat and between said posts. The gate was suspended at the other end in a similar way, except that the post on the side towards the farm was put further in the gateway than the post opposite it, so that the gate could be swung open into the right of way, but could not be opened into the field. If those posts at the hinged end had been put in exactly the other way, the gate could not have been swung into the right of way and could not have been opened by animals in the field. At the opening end the cleat was so high that the gate, when closed, did not rest upon the ground. The top board was old cracked and broken . It was worn smooth and the cleat upon which it rested was worn smooth and this made it easier for an animal rubbing against the gate to move the projecting board, so as to open the gate. The distance which the top board projected beyond the cleats and between the posts was slight, and if it had been much longer, it would have been much more difficult for an animal to open the gate. The post on the railroad side at that point was round, which aided in opening the gate with ease. This evidence warranted the court in finding that the gate was defective and insufficient to retain stock.

The day before about six inches of snow fell. The tracks of the horses were plainly visible in the snow at the gate and where they passed through. It is the theory of defendant that some hunter passed through this gate and left it open. There were no tracks of any human being in the snow, which was very strong proof that the horses opened the gate. Some six weeks after this accident one of these horses which was not killed was seen to open this gate by pushing or rubbing against it.

apart and a latch was nailed across these, perhaps four feet from the ground, and the top board extended a few inches beyond the upright part thereof and the gate was closed by placing this projected part of the top board over said latch and between said posts. The gate was suspended at the other end in a similar way, except that the post on the side towards the farm was put further in the gateway than the post opposite it, so that the gate could be swung open into the right of way, but could not be opened into the field. If those posts at the hinged end had been put in exactly the other way, the gate could not have been swung into the right of way and could not have been opened by animals in the field. At the opening end the latch was so high that the gate, when closed, did not rest upon the ground. The top board was old cracked and broken. It was worn smooth at the latch upon which it rested was worn smooth. In this manner it became for an animal rubbing against the gate to move the projecting board, so as to open the gate. The distance which the top board projected beyond the latch and between the posts was slight, and if it had been much longer, it would have been much more difficult for an animal to open the gate. The post on the railroad side at that point was round, which did in opening the gate with ease. This evidence warranted the court in finding that the gate was defective and insufficient to retain at ch.

The day before about six inches of snow fell. The tracks of the horses were plainly visible in the snow at the gate and where they passed through. It is the theory of defendant that some hunter passed through this gate and left it open. There were no tracks of any human being in the snow, which was very strong proof that the horses opened the gate. Defendant's witness for this accident one of these horses which we met trying to open this gate by pushing or rubbing against it.

Within six weeks after this accident plaintiff signed two different statements which said, the first that the gate was left open by an unknown party and the second that plaintiff thought some one had slid the gate open and did not close it, as it would be impossible for horses to open the gate. These statements were prepared by persons in the employ of defendant and plaintiff testified that when preparing these statements, the agents talked much to him and that he understood that they were about to settle with him for the horses and he looked it over hastily and did not know that it contained these statements when he signed it and that he did not say those things to the agents and that they were not true. These statements were proper to be considered by the court as affecting the testimony of plaintiff. It is plain from the entire statements that he did not mean that he had seen any one leave the gate open at that time nor that any other person had seen it left open and told him of it, but only that that was the opinion he then entertained. There is nothing to show that the court did not give due weight to these statements and it is evident that the court nevertheless believed that the horses did open the gate because of its defective condition.

The editor of a local newspaper interviewed plaintiff and others and published an article which in effect stated that plaintiff thought that careless hunters left the gate open. It is argued that the court erred in refusing to admit that article in evidence. The editor who wrote it was a witness and he testified in effect that at the time he interviewed plaintiff and others, but that he could not then remember from whom he got the information above referred to. It is obvious that it was competent for him to testify in behalf of defendant to anything plaintiff said, but that the article was incompetent. Plaintiff and two neighbors

Within six weeks after this accident plaintiff signed two inferent statements which said, the first that the gate was left open by an unknown party and the second that plaintiff thought some one had left the gate open and did not close it, as it would be impossible for horses to open the gate. These statements were prepared by persons in the employ of defendant and plaintiff testified that when preparing these statements, the agents talked much to him and that he understood that they were about to settle with him for the horses and he looked it over hastily and did not know that it contained these statements when he signed it and that he did not say those things to the agents and that they were not true. These statements were proper to be considered by the court as affecting the testimony of plaintiff. It is plain from the entire statements that he did not mean that he had seen any one leave the gate open at that time nor that any other person had seen it left open and told him of it, but only that that was the opinion he then entertained. There is nothing to show that the court did not give due weight to these statements and it is evident that the court never believed, believed that the horses did open the gate because of the defective condition.

The editor of a local newspaper interviewed plaintiff and published an article which in effect stated that plaintiff thought that careless hunters left the gate open. It is argued that the court erred in refusing to admit that article in evidence. The editor who wrote it was a witness and testified in effect that at the time he interviewed plaintiff and others, but that he could not then remember from whom he got the information above referred to. It is obvious that it was competent for him to testify in behalf of defendant to anything plaintiff said, but that the article was incompetent. Plaintiff and two witnesses

had caused a notice, signed by them and warning hunters from b-ing upon the premises, to be posted along the railroad a half mile from the place of the accident. The court properly refused to admit that notice in evidence. Defendant offered several propositions of law. Some of these the court marked held but not sustained by the evidence, and that holding we find to be correct. Another was properly refused and others were properly modified. One witness for defendant had testified that he passed by there at three o'clock of the afternoon of the preceeding day and the gate was then closed. Defendant offered a proposition that the burden was upon the plaintiff to show that the gate was opened after three o'clock of that day. The court so modified the proposition as to omit the reference to the hour. As offered, the proposition was equivalent to saying that the testimony of the witness was unqualifiedly true. This is not a proposition of law but of fact, and it was not the duty of the court to make that finding upon that side issue. The witness was cross examined and it was for the court to weigh and consider his testimony on direct and cross examination with all the other evidence in the case and to give it such weight as it was entitled to. It was manifestly true that if the court believed that witness told the truth and was correct as to the hour, then it was necessary for plaintiff to prove that the gate was opened afterwards.

The judgment is affirmed.

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plaintiff to prove that the gate was opened afterwards.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6560

4305

211 I.A. 607

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6560

Daniel Jenkins, appellee

vs Appeal from Peoria.

Crescent Auto Co. appellant.

Dibell, P. J.

The Crescent Auto Company is a corporation having its principal place of business in Peoria. On April 5, 1917, it had three stockholders, who were also directors and officers. Knudson owned four fifths of the stock and was secretary. Eckley was treasurer and owned one tenth. Ryan was president and owned one tenth. They often called each other partners. Knudson and Eckley were sales agents. Ryan ran the repair shop. They had a sub-agent at Pekin. Jenkins lived in Pekin and had an old Mitchell carand wished to buy a new Elgin car and turn in his old car. The sub-agent failed to be able to make a contract with Jenkins. Knudson went to Pekin and made a contract with Jenkins. It was partly oral and partly written. A printed blank, apparently designed to be signed by the purchaser, was partly filled out so as to indicate the name and style of the car purchased and the price, and it contained also the following: "We hereby guarantee to sell Daniel Jenkins' Mitchell within 60 days from date for the sum of $300.oo. The title to said Mitchell to remain in Mr. Jenkins until sold. When sold the cash to be refunded to Mr. Jenkins." The secretary signed this paper and delivered it to Jenkins and Jenkins gave the secretary $950 and delivered to Jenkins a used Elgin car, which was to be replaced in a few days by a new car and which was so replaced. Afterwards trouble arose between Knudson and the other officers of the company and Knudson sold out to Ryan and left the company. Thereafter Eckley went to Pekin and got the Mitchell car and placed it in the company's

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The secretary signed this p er and delivered it to Jenkins and Jenkins gave the secretary $560 and delivered to Jenkins a used Elgin car, which was to be replaced in a few days by a new car and which was so replaced. Afterwards trouble arose between Knudson and the other officers of the company and Knudson sold out to Ryan and left the company. Thereafter Eckley went to Pekin and got the Mitchell car and placed it in the company's

garage. When the sixty days were up it had not been sold. Jenkins demanded the $300 of the company and after numerous interviews and various promises which were not performed, he sued the company before a justice and had a judgment for $300. Defendant appealed to the circuit court where the cause was tried without a jury and plaintiff again had a judgment for $300. Defendant now appeals to this court andsets up two defenses.

Defendant contends that it had no power to give the foregoing guarantee and that Knutson had no power to execute such a guarantee if the company could. The charter of the company gives it about all the power to sell, trade, barter and exchange automobiles which words can express. The bylaws provided that the secretary perform such duties as the board of directors shall prescribe. The company has no record of any order prescribing any duties to be performed by the secretary. But the defendant proved that Knudson was a sales agent. It kept and cashed the check that Jenkins gave it. It never asked to have its Elgin car returned. Very shortly thereafter Knudson informed Eckley of the agreement to sell Jenkins' old car. After Knudson had left, Eckley went to Pekin and got the old car and testified that he considered the company was under the moral obligation to try to sell it. There is proof that he thereafter repeatedly said that Jenkins was entitled to $300. and that he should have it and that it would be paid. We hold that the company could not accept the results of the contract made for it by its officer, who owned four fifths of the stock, and yet repudiate that part of the agreement which was unsatisfactory to it. There was proof that Eckley was told there was a written contract, and that if he did not read it it was his own lack of attention. We conclude that the first point is not well taken.

We have carefully read all the evidence in the record

garage. When the sixty keys were up it [illegible] sold. [illegible] demanded the $600 of the company and [illegible] numerous interviews and various promises which were not [illegible], [illegible] the company before a justice and had a judgment [illegible]. [illegible] appealed to the circuit court where the cause was tried before a jury and plaintiff again had a judgment for $[illegible]. [illegible] appeals to this court [illegible] two [illegible].

Defendant contends that it had no power to give the foregoing guarantee and that Knudson had no power to execute such a guarantee if the company could. The charter of the company gives it about all the power to sell, trade, barter and exchange automobiles which works can express. The bylaws provided that the secretary perform such duties as the board of directors [illegible] prescribe. The company has no record of any order prescribing any duties to be performed by the secretary. But the defendant proved that Knudson was a salesman. It [illegible] well established by [illegible] Tenkine gave it. It may [illegible] to prove it. [illegible] returned. Very shortly thereafter Knudson informed Tenkine [illegible] to sell Tenkine' car. After Knudson had left, Tenkine went to Pekin and [illegible] the car [illegible] the company was under no moral obligation to pay [illegible] it.

There is proof that at the earlier reasonably [illegible] Tenkine was entitled to $600. [illegible] he should have it [illegible] it would be paid. We hold that [illegible] could not [illegible] of the contract [illegible] for it by it [illegible], be [illegible] of the stock, [illegible] that [illegible] was unable [illegible] to it. There was [illegible] there was a valid contract, [illegible] was his own act of [illegible]. We conclude that [illegible] is not well taken.

We have carefully read all the authorities [illegible]

and we conclude that the real arrangement was as follows. The scheduled price of the Elgin car was $985. Jenkins was unwilling to pay so much and he wished to turn in his old car at $300. He had previously been offered that sum for it. He toll this to Knudson and Knudson went with Jenkins to the garage where it was kept and examined the old car and said it was worth $300. But Knudson told Jenkins that they were soon to have a lot of new cars come in and needed the money very much, and finally proposed to him that if, besides paying in cash all the price of the Elgin car except $300, he would also loan or advance them $300, they would put the price down to $950 and would guarantee to sell the old car within sixty days for $300 and then refund him that sum which he should so advance. To this Jenkins agreed. This explains the use of the word "refunded" in said ~~written~~ writing. If that had been simply an agreement to sell his car in sixty days for $300 and the Elgin car was already paid for, the paper would naturally have been drawn to say that when the old car was sold, the company would pay him the proceeds. The word "refunded" is in harmony with the oral conversation between them. This is proved and is not disputed. Eckley testified to the moral obligation of the company and there is much proof that he promised to pay this $300 when the sixty days were up and the car not sold. Eckley denies this but the preponderance is decidedly against him and the court believed the greater number of witnesses, and we see no reason for doubting the correctness of that conclusion. It follows that the true meaning of the entire transaction is that Jenkins loaned the company $300 to be repaid within sixty days and it was not repaid. But defendant says that Jenkins still has his title to the car and also that the company put some repairs upon it. In our opinion when the defendant pays this judgment, it will be at least the equitable owner of the car and of the improvements

and we conclude that the real arrangement was as follows. The scheduled price of the Elgin car was $300. Jenkins was unwilling to pay so much and he wished to turn in his old car at $200. He had previously been offered that sum for it. He took this to Knudson and Knudson went with Jenkins to the garage where it was kept and examined the old car and said it was worth $200. But Knudson told Jenkins that they were soon to have a lot of new cars come in and needed the money very much, and finally proposed to him that if, besides paying in cash the price of the Elgin car except $200, he would also loan or lend them $200, they would put the price down to $380 and would place the old car within sixty days [illegible] which he should be advised. To this Jenkins agreed. The explains the use of the word "refunded" in the ~~[illegible]~~ writing. If that had been simply an agreement to sell his car in sixty days for $200 and the Elgin car was actually paid for, the [illegible] would naturally have been drawn to say that when the old car was sold, the company would pay him the proceeds. The word "refunded" is in harmony with the oral conversation between them. This is proved and is not disputed. Jenkins testified to the actual delivery of the company and there is no proof that he paid $200 when the sixty days were up and [illegible] denies this but the preponderance is clearly with him and the court believed the greater number of witnesses. There is no reason for so doing the correctness of the conclusion. It follows that the transaction was [illegible] Jenkins loaned the company $200 to be [illegible] within sixty days [illegible] not repaid. But if Jenkins says that [illegible] to the car and [illegible] on it. In our opinion when the defendant pays his $[illegible], [illegible] at least the equitable owner of the car and [illegible]

which it has placed thereon, and it has possession of the car.

In this view of the proofs we fail to find any debateable rulings of the court upon the evidence or propositions of law which if they had been otherwise, could have resulted in a different judgment.

The judgment is affirmed.

which it has placed thereon, and it has possession of the car.

In this view of the proofs we fail to find any determinable ruling of the court upon the evidence or instructions of law which if they had been otherwise, would have resulted in a different judgment.

The judgment is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6540

1307

211 I.A. 622

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6540

Henry W. Mahle, et al appellees

vs Appeal from Stark.

Otto F. Mahle, et al.

(Otto F. Mahle, appellant.

Carnes, J.

The appellees, Henry W. Mahle, Mary Best, Ida Davidson, and Rose Ann Green, four of the five children of Ferdinand Mahle deceased, filed a bill asking a construction of his will making defendants his widow, and the appellant, the executor Otto F. Mahle, his other child. The defendants joined in an answer to which a replication was filed and a decree entered reciting that the case was heard by the chancellor on bill, answer and replication. Otto F. Mahle appealed to the supreme court where the cause was transferred to this court.

x It was alleged in the bill and admitted by the answer that Ferdinand Mahle, a resident of Stark County, Illinois, died in May 1915, leaving surviving Alvina Mahle, his widow, and said five children, his only ~~xxxixx~~ heirs-at-law; that his estate ~~xxxix~~ consisted of eighty acres of land in Stark County and sufficient personal property so that $1682.13 was left in the hands of the executor after payment of funeral expenses and debts that his will was admitted to probate in Stark County June 8, 1915, and Otto F. Mahle there qualified as executor, and filed a report June 30, 1916, showing a balance in his hands of $1682.13, and the estate in the county court as fully settled except as to the distribution of that sum; that the will read as follows:-

" Last Will and Testament.

Ferdinand Mahle, of the Town of Essex, in the County of Stark

and State of Illinois, made and published in the fifth day of September in the year of our Lord One Thousand Nine Hundred and Eleven.

In the name of God Amen. I, Ferdinand Mahle, of the Town of Essex , in the County of Stark and State of Illinois, at the age of 82 years and being of sound mind and memory, do hereby make, publish and declare this, my last will and testament, in manner following, that is to say.

First; It is my will that my funeral expenses and all my just debts be fully paid.

Second; I give and bequeath to my wife, Alvine Mahle, all my estate, both real and personal, of every kind and description, of whatsoever the same may consist, and wheresoever the same may be situated, for her maintenance and support, during her life time.

Third; I give and bequeath to my son, Otto F. Mahle after the death of my wife, Alvine Mahle, the land I now own, described as the North half of the Northwest quarter of Section No. Thirty six (36) in Township No. Twelve (12) North, Range No. Six (6) East of the Fourth Principal Meridian, in Stark County Illinois, containing Eighty ~~Acre~~ (80) Acres more or less, on condition that he shall pay the sum of Eight Thousand ($8000) Dollars to the rest of my children as follows: To my daughter Ida Davidson, wife of James Davidson, of Atlantic Iowa, the sum of Two Thousand Dollars ($2000) To my son, Henry W. Mahle, the sum of Two Thousand ($2000) Dollars. To my daughter Mary Best, wife of William Best of Peoria County, Illinois, the sum of Two Thousand ($2000) To my daughter Rose Ann Green, wife of William Green, of Princeville, Peoria County, Illinois, the sum of Two Thousand ($2000) Dollars.

and State of Illinois, [illegible] this 11th day of September in the year of our Lord Nineteen Hundred and Eleven.

In the Name of God Amen. I, [illegible], the Town of Hanover, in the County of [illegible], State of Illinois, being of the age of 82 years [illegible] of sound and disposing memory, publish and declare this, my last will and testament, in manner following, that is to say:

First; It is my will [illegible] my just debts [illegible] public.

Second; I give and bequeath to my [illegible] all my estate, both real and personal, [illegible] ation, [illegible] exclusively to attached, [illegible] her life time.

Third; I [illegible] bequeath to [illegible] after the death of [illegible] described as [illegible] No. Thirty six (36) in [illegible] Six (6) [illegible] Illinois, commencing [illegible] a rame (30) [illegible] in consideration [illegible] Do hereby [illegible] Ida Davidson, [illegible] of Two Thousand [illegible] sum of Two Thousand [illegible] wife of [illegible] Thousand ($[illegible]) [illegible] Green, of [illegible]

Thousand ($[illegible]) Dollars.

Fourth: I direct that the balance of my estate, if any be left at the death of my wife, Alvine Mahle, be then divided equally between my five children above mentioned, share and share alike.

Lastly: I hereby nominate and appoint my son, Otto F. Mahle, to be the executor of this, my Last Will and Testament, without bond, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal, this 5th. day of September, in the year of our Lord, One Thousand Nine Hundred and Eleven.

SEAL. Ferdinand Mahle."

that the will should be construed as vesting in Otto F. Mahle on the death of the testator a fee simple title in said eighty acres of land subject to the life estate of his mother, the widow, and subject to the lien of the other four children for the payment of said two thousand dollar legacies.

It is averred in the bill that under a proper construction of the will said two thousand dollar legacies are due within one year after the death of the testator. The answer denies this construction and asserts that said legacies are due at the time of the death of Alvine Mahle, the life tenant, and not before. Whether this payment was required at the one time or the other is the only question presented to the trial court that we are asked to review. The pleadings present the question whether the $1682.13 in the executor's hands should be paid to the widow with liberty to her to use the income and if necessary the principal for her maintenance and support, or should be paid to a trustee with directions to invest and pay the income to the widow during her life and the principal to the five children on her death. The chancellor held that the widow is entitled to the fund and to use the principal, if so necessary; and that

Fourth: I give [illegible] of my estate, [illegible] at the death of my wife, [illegible] between my five surviving [illegible].

Lastly: I hereby [illegible] to be the executor of this, [illegible] bond, hereby revoking [illegible].

In witness whereof, I [illegible] this 5th. day of [illegible], in [illegible] Thousand Nine Hundred [illegible].

[illegible]

that [illegible]

on the death [illegible]

[illegible]

[illegible]

the [illegible]

It is [illegible]

[illegible]

one year [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

construction is not here objected to. There was also an allowance to complainants of solicitors fees to be paid out of said moneys in the hands of the executor; but that is not here questioned. Appellant in his brief says: "There is no dispute as to the vesting of title in appellant subject to the life estate of the surviving widow, Alvine Mahle, or that the legacies are vested and a charge upon the real estate devised to Otto F. Mahle. The only dispute is as to the time of payment of said legacy of $2000 to each of the four "legatees (appellees)" And again, "in this cause it is agreed by all parties that the title vested in Otto F. Mahle, devisee, subject first to the life estate of Alvine Mahle, who still survives; that the legacies are also vested in favor of the legatees; that their payment is charged on the land devised to said Otto F. Mahle, but the time of payment of said legacies is a vital point of difference." Appellees in their brief say "the only question before this court is as to the time of payment of these legacies", and that they contend "they are payable not later than one year after the probate of the will and issue of Letters."

The decree found the title in accordance with the construction adopted by all the parties; found that no time was named in the will for the payment of said two thousand sums; that payment was required one year after the issue of Letters Testamentary to appellant, and ordered him to pay said sums with interest at five per cent, from one year after the date of Letters Testamentary, and to make such payment within ninety days, and directed that in case appellant should fail to pay said sums or to sell said land for the payment of the same, that the master in chancery should sell the land and pay said legacies out of the proceeds, and pay the balance remaining to appellant.

consideration is not more objected to. There was no allowance to complainants of solicitors fees [illegible] out of said money in the hands of the executor; but this is not assigned. Appellant in his brief says: "The only dispute is to the vesting of title in residuary subject to the life estate of the surviving widow, Alvina Mabie, or that a legacy was vested and a charge was on the real estate devised to Otto T. Mabie. The only dispute is as to the time of payment of said legacy of $2000 to each of the four "residuaries (a[illegible])" And again, "In this cause it is asserted by all parties that the title vested in Otto T. Mabie, devisee, subject to the life estate of Alvina Mabie, who is still surviving, [illegible] are also vested in fee of a legacy; that title vested is contested only in and vision to [illegible] Otto T. Mabie, but the time of payment of said legacy accrues in [illegible] point of [illegible]." Appellees in their brief say "the only question before this court is as to the time of payment of these legacies", [illegible] they contend "that [illegible] not later than one year after the death of the [illegible] of Mintern."

The issue over the title in [illegible] with a construction [illegible] by the parties; [illegible] in the will for the payment of said two thousand dollars; [illegible] ment was required one year after [illegible] tary to [illegible], [illegible] in to pay [illegible] at five per cent, [illegible] one year after [illegible] twenty, [illegible] recited that in case a [illegible] sell said land for [illegible] chancery should sell the land [illegible] proceeds, and pay the balance remaining to [illegible].

The chancellor evidently adopted the construction of the will insisted upon by all the parties to the suit insofar as they agreed and after adopting that construction we see no ground to question his conclusion as to the time of payment of the two thousand dollar sums. Appellant suggests that under the third clause of the will he was given said land "after the death of my wife" on condition that he pay said sums aggregating eight thousand dollars, and therefore it was not intended that he should pay them until after the death of the widow. There would be force in this suggestion in the absence of the admission that appellant took title to the land at the time of the testators death. On his theory of the case he then took a present tiele to an interest in remainder in the eighty acres of land, subject to the lien for the payment of the two thousand dollar legacies. He insists in the trial court and here that those legacies vested on the death of the testator and that it then became his duty to pay them at some time. We see nothing in the will so construed deferring the payment until appellant should get possession of the property devised him. An estate in remainder is property subject to transfer, sale and mortgage like other property. We are of the opinion that the construction agreed to by the parties and adopted by the court is not correct.

There is much room for contention that the widow under the second clause of the will took the real estate as well as the personal property, with the right to use the income and consume the principal, if necessary, for her maintenance and support; that said words above quoted "after the death of my wife" have the effect to postpone the vesting of the remainder in appellant until after the widow's death; that the devise to appellant of the land amounts only to an offer if he sees fit, after the death of the widow, to accept and comply with the conditions. Under that construction he could not be required to pay anything before

The chancellor evidently adopted the construction of the will insisted upon by all the parties to the suit thereto as they argued and after adopting that construction we see no ground to question his conclusion as to the time of payment of the two thousand dollar sums. Appellant suggests that under the third clause of the will he was given a fee and "after the death of my wife" on condition that he pay the two thousand dollar sum, apparently eight thousand dollars, and therefore it was not intended that he should pay them until after the death of the widow. There would be force in this suggestion in the absence of the express fact that testator took title to the land at the time of his testator's death. On his theory of the case he then took a vested title to the fee subject to remainder in the eighty acres of land, subject to the lien for the payment of the two thousand dollars. The trouble in the trial court and one that those lawyers were trying at the death of the testator and that is then he on his way to pay them at some time. We are nothing in the will to construed determining the payment will appearance should be a question of the property devised him. In events in reminder in property subject to transfer, also in interest in other property. We are of the opinion that the construction adopted by the chancellor is not correct.

There is much more to construction of the second clause of the will but we [illegible] personal property, [illegible] the principal, [illegible] that said words above noted "after the death of my wife" have the effect to postpone [illegible] until after the widow's death; [illegible] the land amounts only to a [illegible] of the widow, to wager are complete [illegible] that construction be court not is required to [illegible]

the widow's death. She might necessarily consume all the property real and personal, in her lifetime, or so much of it that it would not be advantageous for appellant to accept the devise and comply with the condition. This construction would have been advantageous to the widow and disadvantageous to all other parties to this suit and particularly to appellant. All parties were adults and before the court. They agreed in their pleadings that the will was not capable of that construction. If they were wrong and it was the privilege of the chancellor to give the will a construction contrary to all their contentions if he saw fit to do so, still appellant cannot complain here that the chancellor adopted his view of the law. He does not here so complain, but on the contrary argues, as above noted, that the chancellor was right except as to the time of payment. We conclude that there is left no duty on this court to investigate and decide questions of law upon which all the parties agree. In a jury trial a verdict based on an incorrect proposition of law is not for that reason disturbed if both parties are responsible in their instructions offered and given for the error committed by the court. A party has no right to complain of an error in his opponent's instructions when a like error appears in an instruction given at his own request. West Chicago St. R. R. Co. v Buckley, 200 Ill. 260; O'Rourke v Spröul 147 Ill. App. 609, and authorities cited in those cases. A party who has with knowledge of the facts assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. 16 Cyc. 796, et seq. and authorities there cited; See also The People v Vaughan, 288 Ill. 163, 165. Assuming a construction of that part of the will agreed to by all the parties, the conclusion of the chancellor logically and properly followed.

the widow's health. She might properly consider all the to with
real and personal, in her affidavit, as the much of it [illegible]
not be adequate [illegible] to support [illegible] family
with the condition. The constitution [illegible] to [illegible]
to the minor's [illegible] to [illegible] to this suit
and [illegible] to [illegible]. A [illegible] before
the court. They appeal [illegible]
capable o[illegible] construction. [illegible]
privilege of [illegible] for to give [illegible]
contrary to [illegible]
appellant [illegible]
view of [illegible]
[illegible] argument, [illegible]
me to [illegible]
[illegible] on this point to [illegible]
which [illegible]. In [illegible]
in incorrect [illegible] of law [illegible]
if both parties [illegible]
plain for [illegible]
to complain [illegible]
line error [illegible]
West Chicago St. R. Co. v. Dunlavy,
[illegible] 17 Ill. A. 80[illegible].
A party [illegible]
position in [illegible]
inconsistent [illegible]
18 Cyc. 736, [illegible]
The People v. [illegible]
or that part of [illegible]
[illegible] of the [illegible]

The decree seems to charge the executor, as such, with a duty to sell said eighty acre tract and pay said legacies. Appellant appealed both as executor and personally, and appears here in both capacities. He does not question that feature of the decree; therefore we will not attempt to discuss or decide whether the order should have been in that form.

There is no certificate of evidence. As before noted, the decree does not show that proofs were heard. The clerk of the court certified that oral evidence was introduced on the trial showing the value of the land devised to be about $16,000. and a reasonable solicitors fee for complainant to be $400. We do not see that such evidence, if it had been properly preserved would affect the conclusion here. But the law is so well settld as to require no citation of authority that oral evidence imxx in a chancery case cannot in that way be preserved for review. Finding no reversible error in the record the decree is affirmed.

Decree affirmed.

The decree seems to charge the executor, as such, duty to sell with slightly more haste [illegible] with respect. pellant contended both as executor and personally, and appear here in both capacities. He does not question the fairness of the decree; therefore we will not attempt to discuss or decide whether the order should have been in that form.

There is no certificate of evidence. As before noted, the decree does not show that records were heard. The clerk of the court certified that oral evidence was introduced on the trial concerning the value of the land devised to be about $25,000. [illegible] reasonable solicitors fee for compl trust to be $410. We do not see that such evidence, if it had been properly preserved would affect the conclusion here. But the law is so well settled as to require no citation of authority that oral evidence taken in a chancery case cannot in that way be preserved for review. Finding no reversible error in the record the decree is affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6545

4308

211 I.A. 624

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6545. Agenda No. 9.

Alfred S. Hillenbrand, Defendant in Error,

-vs- Error to LaSalle.

Edythe Hillenbrand, Plaintiff in Error.

Carnes, J.

This writ of error is prosecuted by Edythe Hillenbrand, the defendant, in a bill for divorce filed in the circuit court of La Salle county by her husband, Alfred S. Hillenbrand, the defendant in error, The chancellor, on an ex parte hearing, entered a decree of divorce in favor of the complainant, granting him the custody of the minor children and dismissing the defendant's cross bill, and afterwards refused to vacate the decree and permit her to defend the cause and prosecute her cross bill on the merits.

The bill was filed December 29, 1916, alleging the marriage July, 1899, and cohabitation until October 4, 1914, charging wilful desertion from and after that date, and adultery of the defendant with one Ben Hagadone in October, 1914; alleging that three children (girls) were born of said marriage now aged respectively eight, twelve and fourteen years, all of them under the care of complainant's mother at her home in the city of Streator, and that defendant was unfit to have the custody of said children. She was served with summons and on January 18, 1917, she appeared by George F. Belford, and Browne & Wiley, attorneys of LaSalle county, and on January 29, 1917, filed her answer denying the charges of desertion and adultery, and that she was

Gen. No. 6545. Agenda No. 9.

Alfred S. Hillenbrand,
Defendant in Error,

-vs- Error to LaSalle.

Edythe Hillenbrand,
Plaintiff in Error.

Cause, 1.

This writ of error is prosecuted by Edythe Hillenbrand, the defendant, in a bill for divorce filed in the circuit court of La Salle county by her husband, Alfred S. Hillenbrand, the defendant in error. The chancellor, on an ex parte hearing, entered a decree of divorce in favor of the complainant, granting him the custody of the minor children and dismissing the defendant's cross bill, and afterwards refused to vacate the decree and permit her to defend the cause and prosecute her cross bill on the merits.

The bill was filed Dec 29, 1916, alleging the marriage July, 1899, and cohabitation until October 4, 1914, charging willful desertion from and after that date, and adultery of the defendant with one Ben Hagadone in October, 1914; alleging that three children (girls) were born of said marriage now aged respectively eight, twelve and fourteen years, all of them under the care of complainant's mother at her home in the city of Streator, and that defendant was unfit to have the custody of said children. She was served with summons and on January 18, 1917, she appeared by George F. Belford, and Browne & Wiley, attorneys of LaSalle county, and on January 29, 1917, filed her answer denying the charges of desertion and adultery, and that she was

not a proper person to have the custody of said children. At the same date she filed a cross bill charging the complainant with wilful desertion from and after June 22, 1915, with extreme and repeated cruelty, and with adultery, setting out in detail various instances, times and places; averring her own poverty and the wealth of the complainant, praying for alimony, temporary and permanent, and divorce, and the custody of said children.

At the March term the case was noticed for trial by posting a notice in the courtroom (apparently under some rule or custom of the court) and several days thereafter- March 20, 1917- the complainant filed a replication to the answer and a verified answer denying the incriminatory allegations in the cross bill,and on that date the cause was called for trial on said pleadings. The defendant did not appear. Oral and documentary proof introduced by the complainant was heard and a decree for compl inant entered reciting service on and appearance by the defendant in the original bill, and that the cause had theretofore been set by the court for trial on that day, finding the charges in the bill true; that defendant was guilty of wilful desertion and adultery, as charged, and is an unfit perdon to have the care and custody of said minor children; that the allegations in the cross bill are not true, granting the divorce and custody of the children as prayed in the original bill.

A certificate of evidence was filed, from which it appears that the complainant testified to facts supporting his charges of desertion and adultery, and offered in evidence a series of letters in the defendant's handwriting addressed to Ben Hagadone, which he had procured from the wife of Hagadone, Hulda Hillenbrand, the mother of complainant, testified that the family lived with her

not a proper person to have the custody of his children. At the same date the file [illegible] bearing the complainant's [illegible] willful desertion from and after June 22, 1912, with extreme and repeated cruelty, and with adultery, relying on the detail various instances, times and places; averring [illegible] the wealth of the compl inant, praying for [illegible] and divorce, and the custody of the children.

At the March term the case was [illegible] trial by posting a notice in the courtroom (apparently [illegible] of the court) and several days thereafter [illegible] 1912- the compl inant filed a replication to the [illegible] denying the incriminatory allegations in [illegible] date the case was [illegible] on [illegible] defendant did not appear. [illegible] proof introduced by the compl inant was [illegible] sitting service on [illegible] bill, and that [illegible] trial on the [illegible] defendant was guilty of willful [illegible] and in an unfit [illegible] children; [illegible] granting the divorce [illegible] original bill.

A certificate [illegible] that the compl inant [illegible] desertion and adultery, [illegible] the defendant's [illegible] and procured from the [illegible] mother of compl inant, [illegible]

for some months prior to October 3, 1914; that on that date the defendant went away without witness' knowledge and left the three children in the park from which place they came to her house; that she stayed away for more than a year and was in the northwest; that she went away to meet Hagadone and has never returned to live with her husband. Said letters were written in August, September and October, 1914. They occupy thirty-five pages of the record. They show beyond question that defendant was guilty of adultery with Hagadone and that she is not a fit person to have the custody of any girl from eight to fifteen years of age.

About six weeks after the decree was entered, but at the same term of court, the defendant appeared by H.M.Kelly, her solicitor, and moved to vacate the decree and to be heard on the merits, which motion was afterwards heard and overruled. A certificate of evidence heard on the motion was filed. It consisted of the affidavit of George F.Belford, to the effect that he had drafted the answer and the cross bill filed by the defendant; that he understood she relied upon Lee O'Neil Browne to try the case; that Browne was in the legislature and affiant did not know when the case could be reached for trial and had so informed his client; that shortly before the decree was granted affiant had been informed by complainant's brother that the matters had been settled and adjusted, and about that time was also informed that a decree had been granted without contest; that he afterwards learned that his informant had deceived him about the matter. Defendant's affidavit was also read to the effect that she had no notice that the case would be called for trial; was in fact quarantined in a house in Streator on the date of the hearing because her child was there sick with the measles; that she was not guilty of adultery with Hagadone or

for some months prior to October 3, 1914; that on the date the defendant went away without witness' knowledge and left the three children in the park from which place they came to her house; that she stayed away for more than a year and was in the northwest; that she went away to meet Hagadone and has never returned to live with her husband. Said letters were written in August, September and October, 1914. They occupy thirty-five pages of the record. They show beyond question that defendant was guilty of adultery with Hagadone and that she is not a fit person to have the custody of any girl from eight to fifteen years of age.

About six weeks after the decree was entered, and at the same term of court, the defendant appeared by counsel, in solicitor, and moved to vacate the decree and to be heard on the merits, which motion was afterwards heard and overruled. A certificate of evidence heard on the motion was filed. It consists of the affidavit of George Fielding, to the effect that he had drafted the answer and the cross bill filed by the defendant; that he understood she relied upon her counsel to try the case; that process was in the legislature and [illegible] did not know when the case could be reached for trial and was not informed [illegible]; that shortly before the decree was granted [illegible] by complainant's brother that the matter had been settled and adjusted, and about that time [illegible] without contest; that he [illegible] deceived him about the matter. [illegible] read to the effect that she had no notice that the case was called for trial; was in fact quarantined in [illegible] on the date of the hearing, because [illegible] the reason; that she was not guilty of adultery with Hagadone or

any other man; she reiterated the charges in her cross bill of adultery and misconduct on the part of the complainant, but did not deny writing said letters. Two other affidavits were read by the defendant tending to show the truth of the charges in her cross bill of cruelty of defendant in error. The defendant in error introduced the affidavit of his solicitor that the case was noticed for trial about eight days before it was called; that Mr.Wiley, of Browne & Wiley, was in the courtroom and was aware of the fact, and stated that he did not intend to appear. Said letters were again called to the attention of the court on this hearing.

Plaintiff in error argues here that the court should not have considered those letters on this motion, and that he should not have considered the affidavit of defendant in error's solicitor. The evidence heard on the trial was all before the chancellor on this motion; it was his duty to consider the motion in the light of what he knew about the pleadings, evidence and proceedings up to that time. We will not stop to discuss what weight he should have given to the affidavit of counsel as to the posting of notice of trial and opportunity of plaintiff in error's solicitors to know that the case was set and might be called for trial on the day named. In the ordinary course of the business of the court the chancellor may be presumed to know whether the case was called under such conditions and circumstances as to require counsel to respond. It is suggested that Mr. Browne was relied on to try the case. This may be assumed with the further assumption that the chancellor might have so presumed and might have known that Mr.Browne was in the legislature, but there were two other attorneys of his court appearing with Mr. Browne of record, and he would naturally presume when the case was set for

any other man; she retorted [illegible] on
adultery and misconduct on the [illegible], but
not deny writing said letters. [illegible]
by the defendant [illegible] in
her cross bill of [illegible] error. [illegible]
in error instead [illegible]
was noticed for trial [illegible]
that [illegible], or [illegible]
aware of the fact, and [illegible]
said letters were [illegible]
this writing.

Plaintiff in error [illegible]
have considered [illegible]
not have considered [illegible]
tor. [illegible]
for on this [illegible]
light of [illegible]
up to that [illegible]
should be given to [illegible]
of notice of trial [illegible]
fore to know [illegible]
on the day [illegible]
court the chancellor [illegible]
called under such [illegible]
counsel to respond. [illegible]
on to try the case. [illegible]
assumption that the counsel for [illegible]
have known that [illegible]
two other attorneys [illegible]
record, and be most [illegible]

trial and afterwards called for trial with no protest or request for postponement that no postponement was desired. No one of the three attorneys appearing for the plaintiff in error prior to the decree afterwards appeared for her and asked that it be vacated.

A motion to set aside a default or judgment is addressed to the sound legal discretion of the court, and, unless it appears the discretion has been wrongfully and oppressively exercised, a reviewing court will not interfere. Constantine v.Wells, 83 Ill. 192; Scales v;Labar, 51 Ill. 232; Greenleaf v.Roe, 17 Ill. 474. In the last cited case it is said th it must be a very gross and flagrant abuse of discretion that will warrant the revision and interposition of an appellate court. The authorities on this question are collected in Kloepher v.Osborne, 177 Ill. App. 384,392, from which it appears that a reasonable excuse must be shown for not having made the defense. Both diligence and merit must be shown, and it must appear that neither the defendant nor his attorney has been guilty of negligence. Affidavits filed in support of the application to open the judgment are construed most strongly against the party making the application. Counter affidavits were properly heard. Hartford Life Ins.Co., v. Rossiter, 196 Ill. 277. Want of diligence on the part of the attorney binds the client. Eggleston v.Royal Trust Co., 205 Ill. 170.

There is no serious contention, and no room for contention, that the chancellor erred in granting the decree on the proof heard on the trial. The only question is whether he should have set aside the decree and permitted a trial on the merits. If she had been permitted such a trial and had proven her allegation of

trial and afterwards called for trial with no protest or request for postponement that no postponement was desired. No one of the three attorneys appearing for the plaintiff in error prior to the decree afterwards appeared for her and asked that it be vacated.

A motion to set aside a default or judgment is addressed to the sound legal discretion of the court, and, unless it appears the discretion has been wrongfully and oppressively exercised, a reviewing court will not interfere. Downtemine v.Wells, 23 Ill. 192; Scales v;Baker, 31 Ill. 232; Greenleaf v.Roe, 17 Ill. 474. In the last cited case it is said that it must be a very gross and flagrant abuse of discretion that will warrant the revision and interposition of an appellate court. The authorities on this question are collected in Kloepfer v.Osborne, 177 Ill. App. 384,392, from which it appears that a reasonable excuse must be shown for not having made the defense. Both diligence and merit must be shown, and it must appear that neither the defendant nor his attorney has been guilty of negligence. Affidavits filed in support of the application to open the judgment are construed most strongly against the party making the application. Counter affidavits were properly heard. Hartford Life Ins. Co. v. Hosmer, 198 Ill. 374. [illegible] diligence on the part of the attorney bind the client. Eggleston v.City Trust Co., 90 Ill. 170.

There is no serious contention, nor no cause for contention, that the chancellor erred in vacating the decree on the ground of error on the trial. The only question is whether he could set aside the decree and permitted a trial on the merits. If he had been permitted such a trial and had proven her allegation of

extreme and repeated cruelty, it would not have been a sufficient incriminatory defense to the charge of adultery. (Stiles v. Stiles, 167 Ill. 576), and had she proven her charge of adultery it is not clear that she had not, by cohabitating with him after knowledge of the offense, condone it.

We conclude there is not sufficient evidence of diligence of the plaintiff in error and her solicitors in prosecuting and looking after her case in the trial court to warrant us in disturbing the order of the chancellor refusing to set aside the decree; that there could have been no question that plaintiff in error was guilty of adultery as found in the decree whatever conceivable evidence she might have introduced tending to contradict or explain what was said in her letters to Hagadone, and that it was not clear that she was offering to produce evidence of her husband's misconduct that would be a sufficient incriminatory defense. The decree was, however, erroneous in awarding defendant in error the exclusive care, custody, control and education of said children free from any interference of the defendant without further providing that she should have the privilege of visiting the children, and fixing terms and conditions for such visits. (Zimmerman v.Zimmerman, 242 Ill. 552.) It follows that the decree should be affirmed except as to that provision, and as to that it is reversed and the cause remanded to the circuit court with directions to enter a decree in conformity with the views here expressed.

Affirmed in part and reversed in part with directions.

treme and repeated unreliy, it would not have been a sufficient
exculpatory defense to the charge of adultery. (Stiles v.
Stiles, 167 Ill. 276), and had she proven her charge of an insanity
it is not clear that she had not, by cohabitating with him after
knowledge of the offense, condoned it.

We conclude there is substantial evidence of diligence
of the plaintiff in error and her solicitors in prosecuting and
pushing after her case in the trial court to warrant us in direc-
ting the order of the chancellor refusing to set aside the
decree; that there could have been no prejudice to plaintiff in
error was guilty of adultery as found in the decree whatever con-
clusive evidence she might have introduced tending to contradict
or explain what was said in her letters to respondent, and that it
is not clear that she is entitled, to prosecute error in her
husband's misconduct that could be a sufficient jurisdictional
defense. The decree was, however, erroneous in awarding custody
of the children to the complainant, contrary to the wishes of the
children free from any interference of the chancellor, without
providing that she should have the privilege of visiting the
children, and taking them to her home for such visits. (Simmer-
man v.Simmerman, 74 Ill. 267). It follows that the decree
should be affirmed in part and reversed in part with directions.

affirmed in part and reversed in part with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6558.

John Davis, Plaintiff in error.

vs Error to LaSalle.

St. Paul Coal Co. Defendant in error.

Carnes J.

John Davis, the plaintiff in error, was in January, 1914, injured while in the employ of the defendant in error, St. Paul Coal Company, as a mule driver in its coal mine. He brought this action on the case and filed a declaration good except that it contained no averment that the defendant was not operating under the provisions of the Wrokmen's Compensation Act of 1913. A demurrer to the declaration was sustained, and the plaintiff by leave of court amended his declaration by adding in each count an allegation to the effect that at and prior to receiving of his injuries the defendant had elected to reject the provisions of that act. This amendment was filed more than two years after the accident in question. The defendant filed a plea of the general issue, and a plea of the two year statute of limitations to the amended declaration. The court overruled plaintiff's demurrer to said plea of the statute. The plaintiff, electing to abide by his demurrer, his suit was dismissed and a judgment of nil dicit entered against him. He prosecutes this writ of error and says in his brief that the question presented is: "Does the original declaration state a good cause of action, without containing any reference to the Workmen's Compensation Act of 1913? If it does, the judgment should be reversed; If it does not, the judgment should be affirmed."

Plaintiff in error's brief was filed April 1, 1918, and that of the defendant in error April 30, 1918. Each party supports his contention with an able argument and citation of auth-

Gen. No. 5558.

John Davis, Plaintiff in error.

vs. Error to LaSalle.

St. Paul Coal Co. Defendant in error.

Carnes J.

John Davis, the plaintiff in error, was in January, 1914, injured while in the employ of the defendant in error, St. Paul Coal Company, as a mule driver in its coal mine. He brought this action on the case and filed a declaration good except that it contained no averment that the defendant was not operating under the provisions of the Workmen's Compensation Act of 1913. A demurrer to the declaration was sustained, and the plaintiff by leave of court amended his declaration by adding in each count an allegation to the effect that at the time prior to receiving of his injuries the defendant had elected to reject the provisions of that act. This amendment was filed more than two years after the accident in question. The defendant filed a plea of the general issue, and a plea of the two year statute of limitations to the amended declaration. The court overruled plaintiff's demurrer to said plea of the statute. The plaintiff, adhering to abide by his demurrer, did not see fit to plead and a judgment of nil dicit entered against him. To reverse this writ of error and says in his brief that the question presented is: "Does the original declaration state a cause of action, without containing any reference to the Workmen's Compensation Act of 1913? If it does, the judgment should be reversed; if it does not, the judgment should be affirmed."

Plaintiff in error's brief was filed April 2, 1916, and that of the defendant in error April 4, 1916. Each party supports his contention with an able argument and citation of auth-

orities. But after both briefs were filed part 1 of Volume 383 of our Supreme Court Reports was issued containing opinions in Beveridge v Illinois Fuel Co. 383 Ill. 31, and Barnes v Illinois Fuel Co. 383 Ill. 173, decisive of the question presented. Under the authority of those two cases we must hold that the original declaration did not state a good cause of action, and that the trial court did not err in overruling plaintiff's demurrer to the plea of the two year statute of limitations. That authority is so clear and controlling that we deem it unnecessary to notice or discuss earlier cases cited by counsel. The judgment is affirmed.

Affirmed.

orities. But after both briefs were filed part 1 of Volume 283 of our Supreme Court Reports was issued containing opinions in Beveridge v Illinois Fuel Co. 283 Ill. 23, and Barnes v Illinois Fuel Co. 283 Ill. 173, decisive of the question presented. Under the authority of those two cases we must hold that the original declaration did not state a good cause of action, and that the trial court did not err in overruling plaintiff's demurrer to the plea of the two year statute of limitations. That authority is so clear and controlling that we deem it unnecessary to notice or discuss earlier cases cited by counsel. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6559

211 I.A. 627

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in he Clerk's office of said Court, in the words and figures ollowing, to-wit:

Gen.No. 6559.

John Mosley, appellant.

vs Appeal from Co. Ct. Peoria.

William Hundhausen, appellee.

Carnes J.

Appellant, John Mosley, sued William Hundhausen, appellee before a justice of the peace and had there a judgment for $14.00 and costs of suit. The defendant appealed to the county court and had there a verdict on his counter claim for $38.00 from which this appeal is prosecuted. Before the ~~xxxxx~~ trial in the county court appellant filed a written statement of his demand as follows:

"Four days work at $2.00 per day	$ 8.00
"Damage by water	$ 10.00
"Loss of rent by delaying work,	$ 75.00
$	$ 93.00 "

And at the same time appellee filed a written statement of his set off as follows:

"To Hauling gravel for said Mosley at his request $38\frac{00}{100}$ "

We presume these statements were filed in attempted compliance with section 19 of our Justices and Constables act (J & A 6915).

Each party testified on the trial and agreed that appellant was enggged in repairing a dwelling house where he had numerous workmen employed; that he contracted with appellee to do certain cement work about the premises; that it was appellee's duty under that contract to haul gravel upon the premises to be used in that work; that he did haul several loads of gravel there and appellant was offended because it was hauled at that time, declared the contract rescinded and ordered appellee to remove the gravel, which he sometime afterwards did, but they differ as to other provisions of the contract, appellant claiming that it was agreed that the cement work should ~~xxxxxxxxxxxx~~ not be commenced until the plasterers and other work was out of the way,

Gen.No. 8559.

John Mosley, appellant.

vs Appeal from Co. Ct. Pontis.

William Hundhausen, appellee.

Carnes J.

Appellant, John Mosley, and William Hundhausen, appellee before a justice of the peace and had there a judgment for $14.00 and costs of suit. The defendant appealed to the county court and had there a verdict on his counter claim for $93.00 from which this appeal is prosecuted. Before the ~~xxxx~~ trial in the county court appellant filed a written statement of his demand as follows:

"Four days work at $2.00 per day	$ 8.00
"Damage by water	$ 10.00
"Hire of rent by delaying work,	$ 75.00
	$ 93.00 "

And at the same time appellee filed a written statement of his set off as follows:

"To Hauling gravel for Will Mosley at his request 35 00/100 "

We presume these statements were filed in attempted compliance with section 19 of our Justices and Constables act (1 & A 2818).

Each party testified on the trial and proved that appellant was engaged in repairing a building house there and numerous workmen employed; that he contracted with appellee to certain cement work about the premises; that it was appellee's duty under that contract to haul gravel upon the premises to be used in that work; that he did haul several loads of gravel there and appellant was offended because it was hauled at that time, declared the contract rescinded and ordered appellee to move the gravel, which he accordingly did, but they differ as to other provisions of the contract, appellant claiming that it was agreed that the cement work should ~~xxxxxxxxxxxx~~ not be commenced until the plasterers and other work was out of the way,

and because appellee violated that provision of the contract was declared off and appellee agreed to remove the gravel within three or four days. Appellee denied this part of the contract and said the agreement was that he was to begin the work at once and while it was true that the contract was declared off and he was to remove the gravel, the agreement at that time was that appellant should pay him for such removal. Appellant introduced evidence tending to show that the gravel so left on his premises caused water to run into the basement injuring the building and delaying its completion, putting him to extra expense for labor and depriving him of the use of the premises for sometime. That evidence furnished grounds for a reasonable conclusion that appellant's premises were damaged and work delayed by the act of appellee in depositing and leaving the gravel where he did. We think also that it might be reasonably inferred from the evidence, taken as a whole, that no substantial damage to appellant resulted from that cause. Whether appellant or appellee should be believed as to the disputed terms of the contract, and whether substantial damages resulting from leaving the gravel on the premises more than three or four days, were fair questions for the jury involving consideration of facts within the common experience of a jury. If the contract was as appellee states, they were justified in allowing appellant nothing on his claim. We do not think the court erred in accepting the finding of the jury on the facts.

Appellant urges here that his action is in tort and therefore no counter claim is permissible. He did not object to the counter claim when filed, neither did he object on that ground to the evidence in support of it, but at the close of all the evidence he said to the court - "I would like to make a motion that the evidence of the defendant be stricken from the record, as a set-

off, with reference to the payment for this gravel." and the court said - "Motion overruled". Appellant in his bill of exceptions presented to and signed by the court and made a part of this record entitled the cause "Assumpsit". In his brief here he recites the acts of appellee upon which he bases his claim and says they were in violation of his, appellee's contract.

An action in contract is for the breach of a duty arising out of a contract either express or implied, and an action in tort is for the breach of a duty imposed by law. In the absence of common law pleadings it is often difficult to determine whether a particular action is the one or the other. There is an interesting discussion of this subject in Corpus Juris 1013, et seq. The author says if it is not clear to which class the action belongs it will ordinarily be construed as in contract rather than in tort. In the present case the amount involved is so small and the ends of justice so manifestly served by permitting the parties to settle their controversy in one action, that we are not inclined under the condition of the record, as above stated, to go minutely into an examinatbon and discussion of authorities to determine whether the plaintiff's action was ex contractu or ex delicto. We conclude that the court did not err in treating the defendant's claim as properly presented and litigated under the provisions of section 18 of the Justices and Constables act. If it were clear from the record that appellant had filed a statement of a claim in tortand tried his case on that theory instead of pursuing the course that he did, a question might arise requiring more consideration.

The only instructions complained of are those given by the court of his own motion as to the form of the verdict, and the main objection urged as to those instructions is that the court informed the jury that the defendant was claiming a set-off.

off, with reference to the payment for this gravel." and the court said - "Motion overruled". Appellant in his bill of exceptions presented to and signed by the court and made a part of this record entitled the cause "Assumpsit". In his brief here he recites the acts of appellee upon which he bases his claim and says they were in violation of his, appellee's contract.

An action in contract is for the breach of a duty arising out of a contract either express or implied, and an action in tort is for the breach of a duty imposed by law. In the absence of common law pleadings it is often difficult to determine whether a particular action is the one or the other. There is an interesting discussion of this subject in Corpus Juris 1013, et seq. The s that says if it is not clear to which class the action belongs it will ordinarily be construed as in contract rather than in tort. In the present case the amount involved is so small and the ends of justice so manifestly served by permitting the parties to settle their controversy in one action, that we are not inclined under the condition of the record, as above stated, to go minutely into an examination and discussion of authorities to determine whether the plaintiff's action was ex contr ctu or ex delicto. We conclude that the court did not err in trending the defendant's claim as proper by presented and litigated under the provisions of section 18 of the Justices and Constables act. If it were clear from the record that appellant had filed a statement of a claim in tortand tried the case on that theory instead of pursuing the course that he did, a question might arise requiring more consideration.

The only instructions complained of are those given by the court of his own motion as to the form of the verdict, and the main objection urged as to those instructions is that the court informed the jury that the defendant was claiming a set-off.

It is argued that this was error because no set off could be permitted. What we have before said disposes of this contention. We find no reversible error in the record, therefore the judgment should be affirmed.

Affirmed.

It is argued that this was error because x [illegible] cit could be permitted. What we have before said disposes of this contention. We find no reversible error in the record, therefore the judgment should be affirmed.

Affirmed.

TATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in d for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO EREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in e above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6561

211 I.A. 630

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6561

Fred Kreeb, appellee

vs

Lake Erie & Western

Railroad Company, appellant.

Appeal from Woodford.

Carnes J.

This action on the case was brought by Fred Kreeb, the appellee, against the appellant railroad company to recover the value of four horses which had escaped from his field through a farm crossing gateway onto appellant's tracks where they were killed by a passing engine. The declaration charged failure of the defendant to construct a gate sufficient to prevent horses from getting upon the railroad at that point. Appellee had a verdict and judgment for $575. It is not claimed that the verdict is excessive, but it is insisted that the gate was sufficient to turn ordinary stock and therefore a substantial compliance with appellant's statutory duty, and that the evidence does not affirmatively show that the horses got upon the track by reason of the insufficiency of the gate, but on the contrary tends to show it was left open by some third person. The court instructed the jury for the defendant that there was no presumption of negligence against the defendant merely by reason of the fact that the horses went upon the railroad right of way through the gate in question; that the burden of proof was upon the plaintiff to show that the gate was insufficient to turn stock when properly closed, and because thereof the horses of the plaintiff went through the gate; that if the gate was left open by some third person not connected with the defendant and without the knowledge of the defendant there could be no recovery; that if the jury found it was a sufficient gate that could be closed in such a manner as

ion. No. 8561

Fred Kreep, appellee

vs

Lake Erie & Western

Railroad Company, appellant.

Appeal from Woodford.

Carmen J.

This action on the case was brought by Fred Kreep, the appellee, against the appellant railroad company to recover the value of four horses which had escaped from his field through a farm crossing gateway onto appellant's tracks where they were killed by a passing engine. The declaration charged failure of the defendant to construct a gate sufficient to prevent horses from getting upon the railroad at that point. Appellee had a verdict and judgment for $275. It is not claimed that the verdict is excessive, but it is insisted that the gate was sufficient to turn ordinary stock and therefore a substantial compliance with appellant's statutory duty, and that the evidence does not affirmatively show that the horses got upon the track by reason of the insufficiency of the gate, but on the contrary tends to show it was left open by some third person. I s court instructed the jury for the defendant that there was no presumption of negligence against the defendant merely by reason of the fact that the horses went upon the railroad right of way through the gate in question; that the burden of proof was upon the plaintiff to show that the gate was insufficient to turn stock upon property closed, and because thereof the horses of the plaintiff went through the gate; that if the gate was left open by some third person not connected with the defendant and without the knowledge of the defendant there could be no recovery; that if the jury found it was a sufficient gate that could be closed in such a manner as

to prevent stock from pushing it open, then the company had performed its duty under the law and was not required to place any lock thereon. And at the instance of the plaintiff that if they found from the evidence that the gate was so constructed that it would not be held closed and prevent opening by horses or cattle pushing against it, then it would not be a compliance with the law; that the duty of a railroad company to maintain gates at farm crossings is not complied with by building a gate too short for the opening, and if the gate was so constructed that when shut tit would on pressure of ordinary horses swing open, then it was not a gate in compliance with the statutes.

There is no controversy about the law. The controlling question in the court below was, and here is, whether the evidence shows that the gate was insufficient. There is little difference in the evidence as to its construction. Appellant in its brief says it was constructed of boards 16 feet in length, 3 inches thick and 6 inches wide. There were five lengthwise pieces on the gate and they were held together by two uprights at each end and one in the middle. The gate was quite heavy and was supported by cross pieces extended between two posts located at the easterly end of the gate, and two posts set at the westerly end. In closing the gate it would be swung into position and then shoved in a westerly direction between the two posts at the westerly end and when closed it could only be opened by shoving the gate in an easterly direction, so that the westerly end of it would miss the east side of the westerly post. The opening between the two inner posts was 14 feet and 5 inches. The posts were 6 inches in diameter and when closed the westerly end extended in between the posts a distance of five or more inches. The gate when closed extendd from four to seven inches beyond the posts set at the westerly end. In order to open the gate it was necessary to shove

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to prevent stock from pushing it open, then the company had per-
formed the duty imposed [illegible] and was not required to do any
look thereon. And as to the [illegible] of the plaintiff [illegible]
found from the evidence that the gate was so constructed that it
would not be held shut against opening by horses or cattle
pushing against it, then it would not be a compliance with the
law; that the duty of a railroad company to [illegible] that it shall keep its farm
crossings is not complied with by building a gate too short or
the opening, and if the gate was so constructed that when shut it
would on pressure of cattle or horses swing open, then it was not a
gate in compliance with the statute.

There is no conflict overall about the law. The controlling qua-
tion in the court below was, [illegible] is, whether the evidence
shows that the gate was [illegible] fact. There is little difference
in the evidence as to the [illegible] action. A [illegible] in the [illegible] fal
says it was constructed of a [illegible] 12 feet in [illegible], 3 inches
thick and 2 inches wide. There were five lengthwise pieces on
the gate and they were [illegible] together by two [illegible] at each end
and one in the middle. The gate was hung by [illegible] hinges [illegible]
by cross pieces extending between two posts [illegible] at the [illegible]
end of the gate, in the posts set [illegible] perpendicular and. In closing
the gate it could be swung into position and then moved in a
westerly direction [illegible] posts at the [illegible] and
when closed it could only be opened by [illegible] the gate in a
easterly direction, so [illegible] it could not
east side [illegible] westerly post. [illegible] the two
inner posts [illegible] and [illegible]. [illegible] in
diameter and [illegible] feet long [illegible]
posts [illegible] or more inches. [illegible]
extended from [illegible] the posts
westerly and. In order to open the gate it was necessary to move

the same in an easterly direction a distance of from five to twelve inches before it would be permitted to swing toward the railroad track so as to make an opening. The gate when properly closed could not be opened except by pushing it in an easterly direction of at least five inches.

Appellee's claim is that the gate at the free end did not extend far enough between the posts to secure it from springing open if horses rubbed against it; that instead of extending seven inches it ought to extend farther - perhaps to twelve inches. This question was put to the jury to be determined by them from their common knowledge, and is ~~gax~~ presented to this court to be here determined in the same manner. On the trial below appellee offered to prove a description of another gate at the farm crossing and stated that it might be material because he claimed the other gate was constructed according to law, and this gate was not. The court sustained appellant's objection that evidence as to another gate was not competent. This ruling of the court as to the question there passed on was correct, but we think it would have been competent for appellee to prove by expert witnesses what is considered a sufficient gate to turn ordinary stock, and how far the free end should project over the cross piece on which it rests when shut. No further attempt was made in this direction, and it does not seem to have been suggested in the court below and is not suggested here that the matter may not be properly determined from the common knowledge of the jury and the judges passing on the question. There are many cases in other jurisdictions, and some in this, where questions of what is and is not matter of common knowledge have been decided. Our supreme court has said "Courts will not be presumed to be more ignorant than the rest of mankind". (Munn v Burch, 25 Ill. 35, 38.) and "No proof is required of facts which everybody is presumed to know." (C. B. & Q. R. R. Co. v Warner, 108 Ill. 538, 546.)

the same in an easterly direction a distance of from five to twelve inches before it would be permitted to swing toward the railroad track so as to make an opening. The gate when properly closed could not be opened except by pushing it in an easterly direction of at least five inches.

Appellee's claim is that the gate at the face and did not extend far enough between the posts to secure it from swinging open if horses rubbed against it; that instead of extending seven inches it ought to extend further - perhaps to twelve inches. This question was put to the jury to be determined by them from their common knowledge, and is now presented to this court to be here determined in the same manner.On the trial below appellee offered to prove a description of another gate at the farm crossing and stated that it might be substantially the same as that the other gate was constructed according to law, and this, he was not. The court sustained appellant's objection that evidence as to another gate was not competent. This ruling of the court as to the question there passed on was correct, but we think it would have been competent for appellee to prove by expert witnesses what is considered a sufficient gate to turn cattle by stock, and how far the free end should project over the cross piece on which it rests when shut. No further attempt was made in this direction, and it does not seem to have been urged in the court below and is not suggested here that the matter may not be properly determined from the common knowledge of the jury and the judges passing on the question. There are many cases in other jurisdictions, and some in this, where questions of what is and is not matter of common knowledge have been solved. Our supreme court has said "Courts will not be ordered to be more ignorant than the rest of mankind". (Mann v Bunch, 42 Ill. App. 224) and "No proof is required of facts which everybody is presumed to know." (C. B. & Q. R. R. Co. v Warner, 108 Ill. 538, 5 C.)

There are any facts of common knowledge that the jury may find without expert evidence; as for instance, that the wheels of an automobile should be round and of the same height on opposite sides of the car; but expert evidence would be required to inform a jury as to the proper shape- and size of some parts of the engine. Farm gates of this general description are common in Illinois. It is perhaps a matter of commonknowledge among farmers and other men engaged in building and using them how far the free end should extend between the posts to be reasonably safe from opening by pressure of stock against the middle of the gate. Perhaps this knowledge is so common that a judge should treat it as such and inform himself of the fact as he does in various matters of common knowledge, which he himself does not know, by consulting standard treatises and being advised by men familiar with that branch of knowledge. Facts may be of common knowledge and be treated as such on a trial though not within the knowledge of some well informed members of the community. If the proper construction of such a gate is in that class, it is still true that actual, accurate knowledge of how it should be made is much more likely to be found among country jurors than among judges of the courts.

We conclude that the case should be treated here as one submitted to the jury to determine the facts from their common knowledge; that the court committed no error in so submitting it because that method of trial was acquiesced in by counsel on both sides, and that it is not our duty to disturb the finding of the jury on the question of the sufficiency of the gate.

There is no evidence that the gate was opened by some person, or that anybody connected with this suit left it open except it shown from marks found on the ground that it was pushed back several inchesand then pushed on the ground far

There are many facts of common knowledge that the jury may find without expert evidence; as for instance, that the wheels of an automobile should be found and of the same height on opposite sides of the car; but expert evidence would be required to inform a jury as to the proper shape and size of the wheels of the engine. These rules of this general description are common in Illinois. It is perhaps a matter of commodious judge among farmers and other men engaged in building and using them. How far the free and should extend between the posts to be reasonably safe from opening by pressure of stock against the middle of the gate. Perhaps this knowledge is so common that a judge should treat it as such and inform himself of the fact as to loss in various matters of common knowledge, which he ordinarily does not know, by consulting standard treatises and being advised by men familiar with that branch of knowledge. Facts may be of common knowledge and be treated as such on a trial though not within the knowledge of some well informed members of the community. If the proper construction of such a gate is in dispute, it is still true that natural, common knowledge of how it should be made is much more likely to be found among country jurors than among judges of the courts.

We conclude that the case should be tried de novo as one submitted to the jury to determine the facts. Over their common knowledge, that the court committed no error in instructing it because that method of trial was acquiesced in by counsel on both sides, and that it is not our duty to discuss the finding of the jury on the question of the sufficiency of the evidence.

There is no evidence that the gate was opened by any person, or that anybody connected with the mill had left it or except it shown from where found on the ground that it was pushed back several inches and then pushed on the ground for

enough open for horses to get through. Appellant argues that it could not have been so pushed back and dropped on the ground except by human agency, and therefore that it was not opened by the horses rubbing against it and ~~xxxxxxx~~ springing the boards; but if it had been opened by some man it seems probable that it would have been swung open clear from instead of scraping on the ground. The significance of those marks are again ~~xxxxx~~ something likely to be better understood by a jury in an agricultural community than by lawyers and judges. We are not inclined to disturb the jury's conclusion that the gate was not opened by some human agency.

Appellee's instructions are criticised. We have before stated the substance of all the instructions and are of the opinion that they fairly presented the question to the jury.

Counsel for appellee in his closing argument, commenting on the testimony given by one of the appellant's witnesses, said "He has to testify that way to hold his job. His living depends upon it." This statement was objected to as being improper and the court sustained the objection on that ground. It is urged here that notwithstanding that action of the court reversible error was committed by counsel in making that statement. This remark was improper, but we do not regard it reversible error. There is no question of an excessive verdict. It is held in Collins v Sanitary District 270 Ill. 108, citing authorities, that the matter of prejudicial remarks by counsel is one which should be left largely to the sound discretion of the trial judge, and it should be presumed that no misconduct of counsel materially prejudiced the opposite party unless its prejudicial nature is clearly shown by the record. In the present case counsel had the right to call the jury's attention to the fact that the witness was an employee of appellant and ask them to consider what effect that might have on his testimony, this on the ground

enough open for horses to get through. Appellant argues that it could not have been so pushed back and trodden on the ground except by human agency, and therefore that it was not opened by the horses rubbing against it or ~~xxxxxxx~~ swinging the bracket but if it had been opened by some man it seems probable that it would have been swung open clear from instead of sagging on the ground. The significance of these marks are again ~~xxxxx~~ something likely to be better understood by a jury in an agricultural community than by lawyers and judges. We do not incline to disturb the jury's conclusion that the gate was not opened by some human agency.

Appellee's instructions are criticised. We have before stated the substance of all the instructions and are of the opinion that they fairly presented the question to the jury.

Counsel for appellee in his closing argument, commenting on the testimony given by one of the appellant's witnesses, said "He has to testify that say tolell his job. His living depends upon it." This statement was objected to as being improper and the court sustained the objection on that ground. It is urged here that notwithstanding the action of the court reversible error was committed by counsel in making that statement. This remark was improper, but we do not regard it reversible error.

There is no question of an excessive verdict. In Illinois Central Sanitary Dist. vs. Ill. 102, stating that the matter of pecuniary damages by counsel is one which should be left largely to the sound discretion of the trial judge, and it should be carefully not to reduce not counsel substantially practical the a police party unless it or judicial manner is clearly shown by the record. In the instant case counsel had the right to call the jury's attention to the fact that the witness was an employee of appellant and ask them to consider what effect that might have on his testimony, this on the ground

that one may always show and discuss the interest of want of interest of a witness that the jury may determine whether his testimony is likely to be shaded by his interest. The remark complained of had no other or different effect from what might have been reached by a perfectly proper statement. Finding no reversible error in the record, the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6577

211 I.A. 643

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6577. Agenda No. 26.

George Yates,
Appellee,
-vs- Appeal from Peoria.
John D. Phillips,
Appellant.

Carnes, J.

George Yates, the appellee, was in the employ of John D. Phillips, the appellant, as a farm laborer. They had a large, unbroken colt tied in the barn. Appellant directed appellee to lead her out into the yard for water. She was not halter broken and appellee said he could not do it alone. Appellant told him to get another rope and lengthen the halter and he would help him. This was done. As soon as the colt was untied it rushed out of the barn door with appellant and appellee both hold of the rope. When in the yard, struggling to hold the colt, appellant let go the rope. Appellee kept hold of it. Its loose end wrapped around his leg and he was drawn against a post in the yard and his leg broken, resulting in a permanent shortening. He brought this suit to recover for that injury, and on a jury trial had a verdict of $5500, which, on appellant's motion, was set aside and a new trial granted. At the next trial he had a verdict of $5000. A remittitur of $2500. was entered and judgment entered against appellant for $2500. It appears from the evidence that the injury was permanent only because of appellee's disobeying the order of the surgeon; therefore he was not entitled to recover for a permanent injury. The two verdicts were probably

Gen. No. 6577. Appeal No. [illegible].

George Yates,

Appellee,

-vs- Appeal from Tooele.

John D. Phillips,

Appellant.

Gerrard, J.

George Yates, the appellee, was in the employ of John D. Phillips, the appellant, as a farm laborer. They were using a rubber-cloth belt in the barn. Appellant directed appellee to lead her out into the yard for water. While in not having broken and appellee was be[illegible] to do it alone. Appellant told him to get another rope and [illegible] the halter and he would help him. This was done. As soon as he [illegible] the barn he ran out of the barn door with appellee [illegible] of the rope. Then in the barn, stepping to one side of it, appellant let go the rope. Appellee kept hold of it. The loose end wrapped around his leg, he was drawn [illegible] in the yard and his leg broken, resulting in a [illegible] and [illegible]. He brought this action to recover [illegible] injury. The jury returned a verdict of $[illegible], which, on [illegible] motion, was set aside and a new trial granted. At the second trial the verdict of $[illegible] remittitur of $[illegible] was entered by the court [illegible] ment entered by the court [illegible]. The [illegible] evidence that the injury [illegible] disobeying the order of the [illegible]; however, [illegible] to recover for a permanent injury. The [illegible]

based on the assumption that he was entitled to compensation for such an injury. The remittitur cured that error and there is no suggestion that the judgment is excessive. But it is argued that appellant was not negligent; that appellee was negligent and disobeyed the order of appellant, and that the court erred in refusing instructions offered by appellant.

Appellee's contention is that acting on the express order of appellant he attached a rope to the halter making the total lead seventeen or eighteen feet long; that appellant took hold of the end of the rope and directed him to take hold nearer the colt, which he did; that the colt rushed out of the barn and appellant without first giving him any warning let loose of the rope when they were about forty or fifty feet from some posts in the yard; that the end of the rope at once wrapped around appellee's leg and threw it against a post, causing the injury; that appellant in so letting go of the end of the rope without warning was guilty of actionable negligence.

There is little conflict of evidence as to the above facts except whether appellant warned appellee before letting go of the halter. Appellant testifies, that he told him to let go, but is not sure whether it was just before or just after he himself did so. Appellee testifies that he did not hear any such order. There is other evidence bearing on the question, but all considered it was within the province of the jury to determine from their own view of the weight of the evidence, and no such preponderance either way as to warrant a court in disturbing their finding. We think also it was a question for the jury whether letting go

based on the assumption that he was entitled to compensation for such an injury. The contention could that error and there is no suggestion that the judgment is excessive. But it is argued that appellant was not negligent; that appellee was negligent and disobeyed the order of appellant, and that the court erred in refusing instructions offered by appellant.

Appellee's contention is that acting on the express order of appellant he attached a rope to the bitter weighing the total load seventeen or eighteen feet long; that appellant took hold of the end of the rope and directed him to take hold over the bolt, which he did; that the bolt rolled out of the [illegible] without first giving him any warning let loose of the rope; that they were about forty or fifty feet from [illegible] yard; that the end of the rope at once wound around appellee's leg and threw it against a post, causing the injury; that appellant in so letting go of the end of the rope without warning was guilty of actionable negligence.

There is little conflict [illegible] except whether appellant [illegible] go [illegible] bolter. Appellant testified [illegible] not sure whether it was just [illegible] Appellee testified that [illegible] in other evidence bearing on [illegible] was within the province of the jury to [illegible] view of the weight of the evidence, and no such preponderance either way as to warrant a court in overturning their [illegible]. We think also it was a question for the jury whether letting go

of the rope without warning was something that an ordinarily prudent man would not have done under the same or similar circumstances; that is, whether it was or was not negligence. With all the evidence of the surrounding circumstances considered reasonable men might well differ in their conclusion. The court did not err in refusing to direct a verdict. The trial court could not set aside the verdict merely because if on the jury he would have reached a contrary conclusion; but he could and should have set it aside if he considered the verdict manifestly against the weight of the evidence. He did not so consider it. Appellant's counsel call our attention to several cases announcing the undoubted rule that it is our duty to set the verdict aside by reversing the judgment if in our opinion it is contrary to the clear preponderance of the evidence. We would be more inclined to give weight to any impression we have that the conduct of appellant was that of an ordinarily prudent man under similar circumstances but for the verdict of two juries. It is a situation more familiar to men usually called as jurors than to men acting as courts. Laymen called from the body of the county may be presumed to have more familiarity with the subject of colts and their care and are therefore better qualified than lawyers to say what ordinary prudence requires. Apparently twenty-four jurors of the vicinity where these parties live called to express an opinion on the conduct of the appellant have agreed that he was negligent as charged. We think the trial court did not err in approving the verdict, and we are not inclined to reverse the judgment as against the weight of the evidence.

of the rope without warning was something that an ordinarily prudent man would not have done under the same or similar circumstances; that is, whether it was or was not negligence. With all the evidence of the surrounding circumstances considered reasonable men might well differ in their conclusion. The court did not err in refusing to direct a verdict. The trial court could not set aside the verdict merely because if on the jury he would have reached a contrary conclusion; but he could and should have set it aside if he considered the verdict manifestly against the weight of the evidence. He did not consider it. Appellant's counsel call our attention to several cases a reading the well-established rule that it is our duty to set the verdict aside by reversing the judgment if in our opinion it is contrary to the clear preponderance of the evidence. We would be more inclined to give weight to any impression we have that the conduct of appellant was that of an ordinarily prudent man under similar circumstances but for the verdict of two juries. It is a tradition more familiar to us usually called as jurors than to any other class of citizens. Jurors called from the body of the county may be presumed to have more familiarity with the subject of [illegible] than [illegible] therefore better qualified than lawyers to say what ordinary prudence requires. Appropriately twelve-from members of the vicinity where the [illegible] witnesses live called to express an opinion on the conduct of the appellant have agreed that [illegible] negligent [illegible]. We think the trial court did not err in by reversing the verdict, and we are not inclined to reverse the judgment [illegible] the weight of the evidence.

It is insisted that appellee was negligent in not letting go of the rope when ordered to do so, and that he was guilty of disobeying the order of his master and therefore cannot recover, and authorities are cited in support of the rule that an employee knowingly and intentionally disobeying reasonable rules or regulations established for his safety cannot recover if his disobedience is the proximate cause of the injury. But it was a question for the jury whether appellee heard the order to let go and whether it was given in at a time when he could have avoided injury had he heard and obeyed. We are not inclined to disturb the finding of the jury that appellee was in the exercise of ordinary care for his own safety.

There were several counts of the declaration, some of them charging facts of which there is no proof; as for instance, that the colt was vicious and that the rope was unfit for use. Appellant argues at length that under the proof no liability arises under either of those allegations, which we think is true; but it cannot be denied that the action of appellant in letting go of the halter and its surrounding circumstances were sufficiently charged in the declaration to admit proof of the facts before indicated. The general issue was plead. In action for torts plaintiff may prove part of his charge if there be enough proof to sustain his charge. (C.& G.T.Ry.Co.,v.Spurney, 197 Ill. 471.) If a count avers different sets of facts either of which will justify a recovery, advantage of that defect must be taken by special demurrer. (Chicago City Ry.Co., v.O'Donnell, 207 Ill. 478.)

It is insisted that plaintiff was negligent in not letting go of the rope when ordered to do so, and that he was guilty of disobeying the order of his master and therefore cannot recover, and authorities are cited in support of the rule that an employee knowingly and intentionally disobeying reason the rules or regulations established for his safety cannot recover if his disobedience is the proximate cause of the injury. But it was a question for the jury whether appellee heard the order to let go and whether it was given in such a time when he could have avoided injury had he heard and obeyed. We are not inclined to disturb the finding of the jury that appellee was in the exercise of ordinary care for his own safety.

There were several counts of the declaration, some of them charging facts of which there is no proof; [illegible] that the suit was violent and that the rope was in [illegible]. Appellant argues at length that under the proof no liability arises under either of those [illegible], which [illegible]; but it cannot be denied that the action of plaintiff in letting go of the halter and its surrounding circumstances were [illegible] in the declaration to admit proof of the facts [illegible]. The general issue is a plea. In action for tort plaintiff may prove part of the charge in [illegible] be enough [illegible] charge. (C.C.C.&I.Ry.Co., v. Spurney, 147 Ill. 425.) [illegible] avers different matters, if facts either [illegible] recovery, advent go of the defendant [illegible] by [illegible]. (Chicago City Ry.Co., v. Carroll, 207 Ill. 478.)

The court is said to have refused five instructions offered by appellant, and this is urged as error. In the brief they are referred to by number, but we find no corresponding number in the abstract or record, and will only discuss those that are definitely pointed out in the brief. In what appellant there calls number ten the court was asked to tell the jury if the letting go of the rope by the defendant was the proximate cause of the injury, still defendant was not liable unless in letting go of the rope he did not exercise that degree of care and caution under all the circumstances than a reasonable and prudent man similarly situated would have exercised; and by instruction number twelve that if the defendant's letting go of the rope was the proximate cause of the injury, still he was not liable unless the evidence showed that in so letting go of the rope the defendant acted in a careless and negligent manner in disregard of the safety of the plaintiff and not in a way that a reasonable and prudent man person similarly situated would have acted. Appellant says the court should have given one of these instructions. By instruction number fourteen the court was asked to tell the jury that if at the time and under the circumstances a reasonable and prudent man in the place of the defendant would have believed there was danger in longer holding onto the rope, then the defendant if he acted on a fear of receiving great bodily injury and released his hold would not be liable for damages to the plaintiff as a result of his letting go of the rope. These refused instructions embodied two propositions: One, that the jury must find not only that the defendant let go of the rope, but that in so doing he was acting negligently. The other that he had the right to let go whatever the consequences if he reasonably believed himself to be in danger. The court did

The court is said to have refused five instructions offered by appellant, and this is urged as error. In the order they are referred to by number, but we find no corresponding number in the abstract or record. We will only discuss the instructions definitely pointed out in the brief. In what appellant thinks is number ten the court was asked to tell the jury if the letting go of the rope by the defendant was the proximate cause of the injury, still defendant was not liable unless in letting go of the rope he did not exercise that degree of care and caution under if the circumstances that a reasonable and prudent man similarly situated would have exercised; and by instruction number twelve that if the defendant's letting go of the rope was the proximate cause of the injury, still he was not liable unless the evidence showed that in so letting go of the rope the defendant acted in careless or negligent manner in disregard of the safety of the plaintiff and not in a way that a reasonable and prudent man would ordinarily situated would have done. Appellant says the court should have given one of the instructions. By instruction number fourteen the court was asked to tell the jury that if the circumstances of the accident were such that a person in the position of the defendant would have believed there was danger in suddenly throwing onto the rope, then the defendant had a clear right to act on the theory of avoiding great bodily injury and relieving himself from the peril and the liable for damages to the plaintiff as a result of letting go of the rope. These refuse instructions embrace two propositions: One, that the jury must find not only that the defendant, in letting go of the rope, but that in so doing he was acting negligently. The other that he had the right to act upon whatever the circumstances as he reasonably believed him to be in danger. The instructions

instruct the jury that before they could find for the plaintiff they must find that the defendant was negligent and that his negligence was the proximate cause of the injury; that the burden of was on the plaintiff to show that the defendant was negligent and he himself was in the exercise of ordinary care; that the questions of due care should be determined by comparing the conduct of the parties with that of reasonably prudent men under the same or similar circumstances; that the plaintiff assumed the risks that were naturally and ordinarily incident to such an attempt to handle a colt, and if he was injured only because of the colt's indulging in the natural propensity to run and break away then he could nott recover for any injury sustained solely from seeking to lead the colt; that the plaintiff could not recover for the conduct of the horse if that conduct was such as he might naturally anticipate; that if the injury was the result of an unavoidable accident, and not because of any negligence of the defendant, the plaintiff could not recover. It appears therefore that defendant's instruction numbered ten and twelve announced no principle not already stated in other instructions but only re-stated the definition and effect of negligence as applied particularly to the defendant's letting go of the halter. We do not think it was error to refuse those instructions. We are also of the opinion that instruction number fourteen was properly refused. It in effect said that if the defendant believed himself in great bodily injury he might disregard his duty to the plaintiff and act entirely for his own safety. We know of no principle of law warranting that statement.

Appellant cites and discusses many authorities on the

instruct the jury that before they could find for the plaintiff they must find that the defendant was negligent and that his negligence was the proximate cause of the injury; that the burden was on the plaintiff to show that the defendant was negligent and that himself was in the exercise of ordinary care; that the questions of due care should be determined by comparing the conduct of the parties with that of reasonably prudent persons under the same or similar circumstances; that the plaintiff assumed the risks that were naturally or ordinarily incident to such an attempt to handle a colt, and if he was injured only because of the colt's indulging in the natural propensity to run and break away, he could not recover for any injury which could reasonably have been foreseen to lead the colt; that the plaintiff could not recover for the conduct of the horse if the defendant had such a right naturally entitling to; but if the injury was the result of an unavoidable accident, or not because of any negligence on the defendant, the plaintiff could not recover. [illegible] therefore, that defendant's instruction must be sustained [illegible] no principle not always at least in clear instances [illegible] re-stated the definition [illegible] tionally by the defendant's [illegible] not think it [illegible] error to [illegible] ion of the opinion [illegible] refused. [illegible] in great bodily injury [illegible] and not entirely for his own [illegible] of law warranting the [illegible].

Appellant other [illegible]

question of the liability of owners of domestic animals not known to be vicious on the liability of the master for defective machinery of which defects the servant had notice, that the master is not an insurer of his servants safety and not bound to provide him absolutely safe appliances or an absolutely safe place, but is only obliged to use reasonable and ordinary care, but we do not see that those principles and authorities control in this case. The colt was in a sense unsafe, and that was known to appellee as well as appellant. It was perhaps dangerous to undertake to lead her into the yard in the manner attempted. Appellee was fully aware of that danger. If the judgment rested on a charge that appellant was negligent in ordering the colt to be taken into the yard in that manner it would be necessary to consider authorities on the question of the liability of the master for damages resulting from obedience to his order in doing an act known by the servant to be dangerous; but the liability is not predicated on that condition. The claim is, as before stated, that appellant and appellee were engaged in a dangerous undertaking requiring each of them to exercise care and prudence, and that appellant failed to do so. We conclude it was within the province of the jury to find that charge sustained by the evidence and that their finding is not clearly and manifestly against the weight of the evidence; that the record discloses no substantial error of law prejudicial to appellant; therefore, that the judgment should be affirmed.

Affirmed.

Niehaus, J., took no part.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this twentieth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6578. Agenda No.27.

Mabel Eads,

Appellant,

-vs- Appeal from Peoria.

William Moran,

Appellee.

Carnes, J.

Mabel Eads, the appellant, a milliner forty years old earning $27.50 a week, was struck on a public street in Peoria by an automobile driven by an employee of William Moran, the appellee, and severely injured so that she was confined in a hospital for several weeks and unable to work for about thirty weeks. She brought this action on the case, and her evidence showed without much contradiction that her actual damages including loss of earnings was $1604.70, without including anything for pain and suffering, or permanent injury. She had a verdict for $1000. Each party moved for a new trial, but appellee did not press his motion. The court overruled each motion and entered judgment on the verdict, from which the plaintiff appeals and asks a reversal urging that the verdict was inadequate and that the court erred in modifying one of her instructions. Appellee assigns no cross-error but argues that it was within the province of the jury to determine the amount of damages; that they were warranted in assuming that some of the items were unnecessary or exaggerated, and that appellee's driver was not negligent and appellee was, and therefore she should be held not entitled to any damages.

It is the duty of this court to reverse a judgment where the damages awarded are clearly inadequate. Courts hesitate to disturb verdicts on that ground where there is no legal standard for computing damages as in cases of slander and libel, or injury to the person where damages must be based on pain and suffering or permanent disability, or where exemplary damages are warranted and awarded. But even in the latter class of cases verdicts are set aside because of inadequacy of the damages awarded if at first blush it is plain that the verdict is much less than it should have been. (47 L.R.A.33; L.R.A.1915F 491; Paul v.Leyenberger, 17 Ill. App. 167; Kilmer v.Parrish, 144 Ill. App. 270; Orr v.Wahlfeld Mfg. Co., 179 Ill. App. 235; DeFreitas v.Nunes, 130 Ill. App. 195) In the present case there can be no question that appellant suffered more than $1000. damages subject to legal, accurate computation which she was entitled to recover, with a further substantial sum for other injuries resting more largely in the opinion and discretion of the jury if the issue of negligence was found in her favor.

The jury found that issue for the plaintiff; therefore, their verdict is inconsistent. Notwithstanding no cross-error is assigned, we would consider whether we ought to reverse the judgment and remand the cause for another trial if we were of the opinion that the verdict on the question of negligence was so clearly against the weight of the evidence as to call for a reversal on that ground had cross-errors been assigned; but we are satisfied that the trial court would not have been warranted in directing a verdict for the defendant, and that we would not be warranted if cross-errors were filed in reversing the judgment without remanding the case; therefore, the judgment

It is the duty of this court to reverse a judgment where the damages awarded are clearly inadequate. Courts hesitate to disturb verdicts on that ground where there is no legal standard for computing damages in cases of slander and libel, or injury to the person where damages must be based on pain and suffering or permanent disability, or more exemplary damages are warranted and awarded. But even in the latter class of cases verdicts are set aside because of inadequacy of the damages awarded if at first flush it is plain that the verdict is much less than it should have been. (47 L.R.A.(N.S.) L.R.A. 1915B 401; Paul v. Leyenberger, 17 Ill. App. 167; Miller v. Zerwick, 1 L.R.A. App. 270; Orr v. Middleton, 2 Ill. App. 170 (L.R.A. 1915D, Deferiere v. Hunes, 130 Ill. App. 193) In the present case there can be no question that appellant suffered more than $500. Damages subject to legal, accurate adjustment which he is entitled to recover, with a further substantial sum for other injuries resulting more largely in the opinion and discretion of the jury in the cause of negligence as found in our notice.

The jury found this issue [illegible] their verdict is incorrect. [illegible] is assigned, we would consider [illegible] judgment and remand the cause for [illegible] the opinion that the verdict [illegible] so clearly against the weight of [illegible] reversal on the ground [illegible] are satisfied that the trial court would [illegible] in directing a verdict for the [illegible] not be warranted if cross-errors [illegible] judgment without remanding the [illegible]

should be reversed and the cause remanded.

The only other error suggested is that the court modified an instruction as to the measure of damages offered by appellant. It is argued that elements of damage concededly proper to be considered were omitted in the modified instruction so given. Appellee answers that the instruction properly understood is not open to that objection, and that it is no more subject to that criticism since its modification than it was before. The instruction seems to us open to appellant's objection. The judgment is reversed and the cause remanded.

Reversed and Remanded.

Niehaus, J. took no part.

TATE OF ILLINOIS, SECOND DISTRICT. } SS. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in nd for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in he above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(7721-500-5-18)

6480

4315

211 I.A. 646

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in he Clerk's office of said Court, in the words and figures ollowing, to-wit:

Gen. No. 6480. Agenda 9.

George F. Patterson, as administrator of the Estate of William Harry Penry, Deceased,
Defendant in error,
-vs-
Willia, J. Jackson, as Receiver of Chicago & Eastern Illinois Railroad Company,
Plaintiff in error.

Writ of error to Circuit Court Iroquois County.

Niehaus, J.

This is a suit brought by George F. Patterson as administrator of the Estate of William Harry Penry, deceased, for the benefit of the widow and next of kin of the deceased against the plaintiff in error, William J. Jackson, as Receiver of the Chicago & Eastern Railroad Company, to recover damages alleged to have been sustained by said widow and next of kin because of the death of Penry who is alleged to have been killed by the negligence of the plaintiff in error's servants in the operation of a railroad train through the village of Milford in Iroquois county. The Chicago & Eastern Illinois Railroad runs through the village of Milford in a north and south direction, and crosses Jones Street, the main street of the village, practically at right angles. There are two main tracks, the south bound trains use the westerly track and the north bound trains use the easterly track; there is also a sidetrack at the crossing located east of the north bound track. On September 18, 1915, about eight p. m. Penry was coming from his home apparently going to the business part of the village on the northerly side of Jones Street, and was in the act of crossing the south bound or westerly railroad track when he was struck by a train consisting of a locomotive and a caboose running south through the village. The

Gen. No. 6480.

Agenda 2.

George F. Patterson, as administrator of the Estate of William Harry Perry, Deceased,

Defendant in error,

-vs-

William J. Jackson, as Receiver of Chicago & Eastern Illinois Railroad Company,

Plaintiff in error.

Writ of error to Circuit Court Iroquois County.

Niehaus, J.

This is a suit brought by George F. Patterson as administrator of the Estate of William Harry Perry, deceased, for the benefit of the widow and next of kin of the deceased against the plaintiff in error, William J. Jackson, as Receiver of the Chicago & Eastern Railroad Company, to recover damages alleged to have been sustained by said widow and next of kin because of the death of Perry who is alleged to have been killed by the negligence of the plaintiff in error's servants in the operation of a railroad train through the village of Milford in Iroquois County. The Chicago & Eastern Illinois Railroad runs through the village of Milford in a north and south direction, and crosses Jones Street, the main street of the village, practically at right angles. There are two main tracks, the south bound trains use the westerly track and the north bound trains use the easterly track; there are also several other tracks. The crossing located east of the north bound track. On October 18, 1913, about eight p. m. Perry was coming from his home apparently going to the business part of the village on the northerly side of Jones Street, and was in the act of crossing the south bound or westerly railroad track when he was struck by a train consisting of a locomotive and a caboose running south through the village. The

train was an extra, and was running at a speed which was variously estimated by witnesses at from 20 to 50 miles per hour. There are several charges of negligence made in the declaration, including the runing of the train at an exceedingly high rate of speed; a violation of the provisions of the village ordinance by exceeding the speed limit fixed thereby; also the failure of plaintiff in error's servants to operate or ring the signal or alarm bell, which was maintained at the crossing by the plaintiff in error for the purpose of warning persons of the approach of trains. The general issue was filed to the declaration, and the case proceeded to trial, which resulted in a verdict and judgment for defendant in error in the sum of $4500.00; and this writ of error is prosecuted from the judgment.

The principal errors assigned are the refusal of the court to direct a verdict for the defendant because it is claimed that the evidence conclusively shows that the deceased was guilty of contributory negliegene and that therefore legally there was no right to recover; also, that the court erred in admitting the ordinance of the village of Milford regulating the speed of trains running through the village; and in admitting in evidence the entire verdict of the coroner's jury. The contention of the plaintiff in error with reference to the lack of proof of the publication of the ordinance of the village of Milford referred to we do not regard as well taken. Section 4 of article 5 of the act providing for the incoporation of cities and villages provides, that "all ordinances, and the date of publication thereof, may be proven by the certificate of the clerk under the seal of the corpora-

train was an extra, and was running at a speed which was variously estimated by witnesses at from 20 to 30 miles an hour. There are several charges of negligence made in the declaration, including the running of the train at an exceedingly high rate of speed; a violation of the provisions of the village ordinance by exceeding the speed limit fixed thereby; also the failure of plaintiff in error's servants to operate or ring the signal or alarm bell, which was maintained at the crossing by the plaintiff in error for the purpose of warning persons of the approach of trains. The general issue was filed to the declaration, and the case proceeded to trial, which resulted in a verdict and judgment for defendant in error in the sum of $4500.00; and this writ of error is prosecuted from the judgment.

The principal errors assigned are the refusal of the court to direct a verdict for the defendant because it is claimed that the evidence conclusively shows that the deceased was guilty of contributory negligence and that therefore legally there was no right to recover; also, that the court erred in refusing the ordinance of the village of Milford requiring the speed of trains running through the village; and in admitting in evidence the entire verdict of the coroner's jury. The contention of the plaintiff in error with reference to the lack of proof of the publication of the ordinance of the village of Milford we do not regard as well taken. Section [illegible] of the act providing for the incorporation of cities and villages provides that "all ordinances, and the date of publication thereof, may be proven by the certificate of the clerk under the seal of the corporation

"tion. And when printed in book or pamphlet form, and purporting to be published by authority of the Board of Trustees or the City Council, the same need not be otherwise published; and such book or pamphlet shall be received as evidence of the passage and legal publisation of such ordinances as of the dates mentioned in such book or pamphlet, in all courts and places without further proof." The ordinance in question was offered and put in evidence, printed in a book containing the revised ordinances of the village of Milford, and purporting to be published by authority of the Board of Trustees of the village; and it appeared from the certificate of the village clerk, under the corporate seal of the village, that the ordinance was published in this way on the date of July 12th, 1915. This was a sufficient compliance with the requirements of the statute and of the proof of the publication of the ordinance. Standard v. Village of Industry, 55 Ill. App. 525. The verdict of the coroner's jury, which was admitted in evidence, contained in addition to the finding that William Harry Henry came to his death by being struck by engine #846 Extra, going south on the C.& E. I. R.R. tracks in the village of Milford, the following:- "From the evidence taken we find that the signal service is out of repair; and that the speed of train is in excess to the safety of life and limb, and does not conform to the ordinance of the village of Milford." We are of opinion that that part of the coroner's verdict which is above quoted should not have been admitted in evidence. The finding that the signal service was out of repair, and that the city ordinance was violated by the speed of the train was not of serious import in this case because these matters were established by other evidence; and we are not holding that it would not have been competent for the coronor's jury to have made a finding of the rate of

tion. And when printed in book or pamphlet form, purporting
o be published by authority of the board of trustees or the city
ouncil, the same need not be otherwise published; and such book
r pamphlet shall be received as evidence of the passage and legal
ublication of such ordinances as of the dates mentioned in such
ook or pamphlet, in all courts and places without further proof."
he ordinance in question was offered and put in evidence, printed
n a book containing the revised ordinances of the village of
ilford, and purporting to be published by authority of the board of
rustees of the village; and it appeared from the certificate of the
illage clerk, under the corporate seal of the village, that the
rdinances was published in this way on the date of July 12th, 1913.
his was a sufficient compliance with the requirements of the statute
nd of the proof of the publication of the ordinance. Blandford v.
illage of Industry, 15 Ill. App. 61. The verdict of the coroner's
ury, which was admitted in evidence, contained in addition to the
inding that Gilliam Harry Carey came to his death by being struck
y engine 946 Extra, going south on the Illinois Central tracks in
he village of Milford, the following: "Upon the evidence taken
e find that the signal service in use at Milford; that the
peed of train is in excess to the ordinance of the village of Milford;
ee not conform to the ordinance of the village of Milford."
e are of opinion that that part of the coroner's verdict which is
bove quoted should not have been admitted in evidence. The
inding that the signal service was out of repair, and that the city
rdinance was violated by the speed of the train was not of ultimate
mport in this case because the ordinance was established by other
vidence; and we are not holding that it would not have been com-
etent for the coroner's jury to have made a finding of the fact of

speed per hour at which the train was running as one of the material circumstances relating to and connected with the death of Penry. But the finding that the speed of the train was in excess of what was required for the safety of life and limb by the coronor's verdict directly fixed upon the plaintiff in error a civil liability by determining that plaintiff in error's servants wer guilty of a grave violation of duty. "It is not withint the province of a Coronor's jury to fix the civil liability of any one growing out of an accident resulting in the death of an injured person." Novitsky, Admr. v.Knickerbocker Ice Co., 276 Ill. 102; Morris & Co., v Industrial Board, 284 Ill. 67. Where a person is killed accidentally, as in this case, by being run over or struck by a railroad train the legitimate object of the coronor's inquest is fulfilled in the finding that the death of the deceased was caused by being run over or struck by a railroad train,"without inquiry whether it was through any one's, or whose negligence." Peoria Cordage Co.v Industrial Board, 284 Ill. 90. It is a reasonable inference that the introduction of the part of the coronor's verdict referred to had a prejudicial effect upon the minds of the jury in passing upon the question of the plaintiff in error's liability, and therefore was reversible error. The question of contributory negligence raised in this case was one for the jury to determine as a question of fact, and the court therefore properly refused to direct a verdict. For the error indicated, however, judgment is reversed and cause remanded for another trial.

Judgment reversed and cause remanded.

eed per hour at w ch the train was running on one of the material
rcumstances relating to and connected with the death of Henry.
t the finding that the speed of the train was in excess of what
s required for the safety of life and limb by the coroner's verdict
rectly fixed upon the plaintiff in error's civil liability by
termining that plaintiff in error's servants were guilty of a
ave violation of duty. It is not within the province of a
roner's jury to fix the civil liability of any one, growing out of
accident resulting in the death of an injured person. Hovinky,
m. v. Minneapolis Ice Co., 296 Ill. 103; Swain v. Co., v
dustrial Board, 284 Ill. 87. There is no error in Illinois Central
, as in this case, by being run over or struck by a railroad train
e legitimate object of the coroner's inquest is ascertained in the
nding that the death of the deceased was caused by being run over
struck by a railroad train, without inquiring whether a stranger
y one's, or was negligence. Peoria Gas Co. v. Industrial
ard, 284 Ill. 90. It is reasonable inference from the introduc-
on of the report of the coroner's verdict referred to that pre-
dicial effect upon the minds of the jury in passing upon the question
the plaintiff in error's liability, was therefore reversible
ror. The question of contributory negligence in this case
s one for the jury to determine. [illegible]
ut therefore properly refused to direct a verdict. For the
ror indicated, however, judgment is reversed and remanded for
other trial.

Judgment reversed and cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6539

211 I.A. 647

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in he Clerk's office of said Court, in the words and figures ollowing, to-wit:

Gen. No. 6539.

The People of the State of Illinois.

Defendant in error.

vs Error to Co. Ct. McHenry.

Ben Silver, Plaintiff in error.

Niehaus, J.

The plaintiff in error, Ben Silver, was tried in the county court of McHenry County, upon an information filedagainst him, containing twenty counts, for selling intoxicating liquor in anti saloon territory; and the jury returned a verdictfinding him guilty on five counts of the information. A motion for a new trial was thereupon made by the Plaintiff in error based principally upon certain matters a leged as newly discovered evidence in affidavits which he filed in connection therewith; but the motion was denied; also a motion in arrest of judgment. Judgment was rendered on the verdict of the jury; and the court sentenced the plaintiff in error to confinement in the county jail for a period of thirty days on each of the 16th. 17th. 18th. 19th. and 20th. counts of the information, (which were the counts referred to in the verdict of guilty) and making an aggregate time of imprisonment of 150 days. It was also adjudged by the court, that the defendant pay a fine of $100 on each of said counts. From the judgment and sentence mentioned, plaintiff prosecutes this writ of error. The principal ground urged for a reversal of the judgment is the refusal of the court to grant a new trial because of the matters set up in the affidavits; and it is also contended that the court erred in the giving of some of the instructions for the people. It is alleged in the affidavits that Sam Kaplan, who was a witness against the plaintiff in error, made repeated efforts to procure testimony against

Gen. No. 6838.

The People of the State of Illinois.

Defendant in error.

vs. Error to Cir. Ct. McHenry.

Ben Silver, Plaintiff in error.

Mershon, J.

The plaintiff in error, Ben Silver, was tried in the county court of McHenry County, upon an information filed against him, containing twenty counts, for selling intoxicating liquor in anti saloon territory; and the jury returned a verdict finding him guilty on five counts of the information. A motion for a new trial was thereupon made by the Plaintiff in error based principally upon certain matters claimed as newly discover d evidence in affidavits which he filed in connection therewith; but the motion was denied; also a motion in arrest of judgment. Judgment was rendered on the verdict of the jury; and the court sentenced the plaintiff in error to confinement in the county jail for a period of thirty days on each of the 16th. 17th. 18th. 19th. and 20th. counts of the information, (which were the counts referred to in the verdict of guilty) and fixing an aggregate time of imprisonment of 150 days. It was also adjudged by the court, that the defendant pay a fine of $100 on each of said counts. From the judgment and sentence aforesaid, plaintiff prosecutes this writ of error. The principal ground urged for a reversal of the judgment is the refusal of the court to grant a new trial because of the matters set up in the affidavits; and it is also contended that the court erred in the giving of some of the instructions for the people. It is alleged in the affidavits that Sam Kaplan, who was a witness against the plaintiff in error, made repeated efforts to procure testimony against

the plaintiff in error; and one Isaac Levison states in an affidavit, that he was approached by Kaplan in the city of Chicago, and solicited by Kaplan to testify that he had bought Liquor from the plaintiff in error, whereupon he replied to Kaplan, that he could not so testify, because he had never bought liquor of him; he also states that Kaplan told him, that the plaintiff in error had given him a beating; and that he wanted to get even with him. Another of the affidavits filed is by Max Dunn, who states, that he was present in the city of Chicago when the conversation between Kaplan and Levison took place, and corroborates Levison as to what was said between them.

Another affidavit with reference to the same matter is by John J. Panosh, who swears that Kaplan approached him on the street at Harvard, and wanted him to testify against the plaintiff in error; and asked him, if he would not testify that Silver gave him drinks of liquor while he was working for him; but that he Panosh refused to do so, and told him that he did not get any drinks from Silver while he was working there. In as much as none of the parties making affidavits testified in the case it is clear, that the purpose of the affidavits is to show that Kaplan had a feeling of resentment, ill will or malice against the plaintiff in error; and contained matters that would tend to impeach Kaplan's credibility. The general rule is, that a new trial will not be granted to afford an opportunity of impeaching a witness. Cochran vs Ammon 1 6 Ill. 315; Fletcher v People 117 Ill. 184. There are exceptions to the general rule; but in this case the evidence outside of Kaplan's testimony was clearly sufficient to sustain the conviction; and it is apparent therefore that the rule applies and not the exceptions. The other affidavits filed, contain statements of several parties to the effect that Mrs. Agnes Schappel (who was a witness against plaintiff in error, concerning

the plaintiff in error; and one Isaac Levison states in an affidavit, that he was approached by Kaplan in the city of Chicago, and solicited by Kaplan to testify that he had bought liquor from the plaintiff in error, whereupon he replied to Kaplan, that he could not so testify, because he had never bought liquor of him; he also states that Kaplan told him, that the plaintiff in error had given him a beating; and that he wanted to get even with him. Another of the affidavits filed is by Max Dunn, who states, that he was present in the city of Chicago when the conversation between Kaplan and Levison took place, and corroborates Levison as to what was said between them.

Another affidavit with reference to the same matter is by John L. Panosh, who swears that Kaplan approached him on the street at Harvard, and wanted him to testify against the plaintiff in error; and asked him, if he would not testify that Oliver gave him drinks of liquor while he was working for him; but that he Panosh refused to do so, and told him that he did not get any drinks from Oliver while he was working there. In as much as none of the parties making affidavits testified in the case it is clear, that the purpose of the affidavits is to show that Kaplan had a feeling of resentment, ill will or malice against the plaintiff in error; and contained matters that would tend to impeach Kaplan's credibility. The general rule is, that a new trial will not be granted to afford an opportunity of impeaching witness. Cochran vs Ammon 1 6 Ill. 318; Fletcher v People 117 Ill. 164. There are exceptions to the general rule; but in this case the evidence outside of Kaplan's testimony was clearly sufficient to sustain the conviction; and it is apparent therefore that the rule applies and not the exceptions. The other affidavits filed, contain statements of several parties to the effect that Mrs. Agnes Sobczyk (who was a witness against plaintiff in error, concerning

the sale of liquor to her husband Stanley Schappel) had admitted at different times that she was not really married to Stanley Schappel; and that he was not her husband. The question as to whether the Schappels were legally married could not properly be adjudicated in this kind of a case; and the evidence would not be competent even to affect the credibility of the witness. The motion for a new trial was therefore properly overruled.

There is apparently some ground for criticism concerning the number and volume of the instructions given for the people on the nature and limitations of a reasonable doubt; but we find no erroneous definitions, or statements in the instructions, which could havemisled the jury; but apparently the instructions on both sides exceeded the requirements of the occasion and the cause in extent and volume; but taking them all together, the law, applicable to the case is stated with substantial correctness there is no reversible error in this feature of the case.

The court erred however in fixing the term of the imprisonment of the plaintiff in error in gross. The rule established by the supreme court, where a defendant is sentenced upon different counts, is to fix a specified time under each count; and also state in the sentence that the time under one shall begin at the expiration of the time under the previous one. People v Elliott 272 Ill. 592. For the purpose of correcting this error in the sentence and judgment the case must be reversed; and it is remanded with directions to the county court to enter a proper judgment and sentence in accordance with rule referred to.

Reversed and remanded with directions.

the sale of liquor to her husband Stanley Schoppel) had admitted at different times that she was not legally married to Stanley Schoppel; and that he was not her husband. The question as to whether the Schoppels were legally married could not properly be adjudicated in this kind of a case; and the evidence would not be competent even to affect the credibility of the witness. The motion for a new trial was therefore properly overruled.

There is so urgently some ground for criticism concerning the number and volume of the instructions given for the people on the nature and limitations of a reasonable doubt; but we find no erroneous definitions, or statements in the instructions, which could bewildered the jury; but apparently the instructions on both sides exceeded the requirements of the occasion and the cause in extent and volume; but taking them all together, the law, applicable to the case is stated with substantial correctness there is no reversible error in this feature of the case.

The court erred however in fixing the term of the imprisonment of the plaintiff in error in prison. The rule established by the supreme court, where a defendant is sentenced on different counts, is to fix a specified time under each count; and also state in the sentence that the time under one shall begin at the expiration of the time under the previous one. Thomas v. People 272 Ill. 582. For the pur ose of correcting that error in the sentence and judgment the case must be reversed and the cause remanded with directions to the county court to enter a new judgment and sentence in accordance with this opinion.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6543

4317

211 I.A. 649

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in he Clerk's office of said Court, in the words and figures ollowing, to-wit:

Gen. No. 6543

William Sorenson, appellee

vs Appeal from Stark.

Lee Cox, appellant.

Niehaus, J.

In this case William Sorenson, the appellee, sued Lee Cox the appellant for the value of a mare owned by him, which was bred to appellant's stallion claiming that insuch breeding the mare was injured because the stallion made an improper connection and an entry into the rectum of the mare; and that from the injuries thereby received the mare died. The case was tried on appeal from a Justice of the Peace, in the Circuit Court of Stark County; and the appellee obtained a verdict and judgment for $160. and this appeal is prosecuted from the judgment. The only question raised on appeal, to reverse the judgment, is one of fact, as to whether or not the groom, who was handling the stallion for the appellant for breeding purposes, was guilty of negligence in not giving proper assistance to the stallion. The evidence tends to show that it is often necessary to assist the stallion in breeding to a mare, to make the proper entry and connection, and to give this assistance is the function of the groom. In this case the proof shows, that when the stallion mounted the mare the groom was six or eight feet away from the place where copulation was to take place, and not in position to give any assistance to the stallion; nor to prevent an improper entry. This appears to some extent from his own testimony. His testimony on this point is as follows: "I was not satisfied that he (the stallion) entered wrong at the time. Later I learned it from what I could see." We think the jury were fully warranted in the conclusion reached from the evidence that the groom was negligent, in the performance of his duties as groom; and that the injury to the mare

on. No. 8543

illiam Sorenson, appellee

vs Appeal from Scott.

e Cox, appellant.

ahan, J.

In this case William Sorenson, the appellee, sues Lee Cox
e appellant for the value of a mare owned by him, which was killed
appellant's stallion claiming that through trespassing the mare
e injured because the stallion made an improper connection and
entry into the vagina of the mare; that from the injuries
hereby received the mare died. The case was tried on appeal from
Justice of the Peace, in the Circuit Court of Scott County;
d the appellee obtained a verdict and judgment for $150. and
is appeal is prosecuted from the judgment. The only question
ised on appeal, to reverse the judgment, is one of fact, to
hether or not the groom, who was in charge the stallion for the
ppellant for breeding purposes, was guilty of negligence in not
aving proper assistance to the stallion. It was now for a to
how that it is often necessary to assist the stallion in breeding
a mare, to make the proper entry and connection. We have
his assistance is the "method of the trade". In the case the
ood shows, that when the stallion mounted the mare the groom was
ix or eight feet away from his head and was [illegible] to
ear place, not in position to give any assistance to the
tallion; nor is it present in human [illegible]. There is no
xcept from his own testimony. The [illegible] on the witness
e follows: "I did not assist I [illegible] (the stallion) at
rong at the time. Later I [illegible] it from [illegible] I could see."
e think the jury were "warranted in the conclusion [illegible]
rom the evidence that the groom was negligent, in [illegible]

from such negligence. This was a question for the jury, and this court would not be justified in disturbing their verdict unless the verdict was manifestly against the weight of evidence.

The judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6565

AT A TERM OF THE APPELLATE COURT,

211 I.A. 653

egun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

resent-The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in he Clerk's office of said Court, in the words and figures ollowing, to-wit:

Gen. No. 6565

F. J. Nelson, for the use of
The Galva Heater Co. appellant.
vs Appeal from County Ct. Knox.
C. E. Quaife, appellee

Niehaus, J.

In this case the appellant F. J. Nelson for the use of the Galva Heater Co. sued the appellee C. E. Quaife in the County Court of Knox County to recover the contract price, of a hot water heating aparatus, which he furnished and set up in appellee's residence at Galesburg. The declaration consists of a special count on the contract; and the common counts; to which was attached an affidavit, claiming $640.33, as the amount due the appellant. The appellee filed the general issue, and a notice of matters of set off or recoupment with an affidavit of merits. The affidavit of merit sets up a breach of warranty as a defense, and damages resulting therefrom, as an offset to the appellant's demand, except $350. There was a trial by jury concerning the additional amount claimed by the appellant, which resulted in a verdict for the appellee; whereupon the appellant made a motion for a new trial which was denied, and the court rendered judgment for the $350 admitted to be due, by the pleadings An appeal is prosecuted from this judgment.

It is argued as a ground for the reversal of the judgment that the court should have granted a new trial, because the verdict of the jury was manifestly against the weight of the evidence; and complaint is also made concerning the modification and refusal of instructions. The proof shows, that the appellee entered into a written contract with the appellant, by which the appellant was to furnish to appellee, a first class hot water

heating aparatus, which was to be a No. 57 Calva Hot Water Heater; to be completed, and set up in the basement of appellee's residence, for the sum of $595; and as a part of this contract appellant guaranteed that "all material and workmanship used in the construction of this aparatus to be the best of their respective kinds, and the aparatus as a whole to be capable of heating all rooms in which radiators are placed, to the temperature specified in the table, in the coldest weather." The temperature specified in the table was 70° in the rooms on the first floor, which included the living room, dining room, hall and vestibule; and 60° in the rooms on the second floor, which were the sleeping rooms. The appellant installed the heating aparatus, but instead of putting in a No. 57 heater, he put in a No. 58 heater, which was 7¾ inches higher than the No. 57. The proof is clearly to the effect that the heating aparatus after it had been installed and put into operation, failed to heat appellee's house as required by the warranty; and a breach of the warranty was thereby established. It is claimed by the appellee that the furnace failed to heat properly because the ~~xxtx~~ heater was higher, and therefore the water pipes leading from the furnace did not have the necessary slant or rise; and that this prevented the hot water from properly circulating through the pipes; that the greater height in the furnace put in, also interfered with the draft, and consequently the furnace smoked. Appellee also claimed, that the furnace was carelessly put together, and that there were defects in its construction which showed a lack of good workmanship: And the evidence tends to support appellee's contention. But appellant insists, the appellee consented to the change of the No. 57 heater to the No. 58; and therefore, must abide by the consequences. Appellee however testified, that he was not aware of the change of the size of the furnace until after it had been installed, and

the jury were warranted in believing his testimony on that point; but even if he made no objection to the change, it would necessarily relieve the appellant from the obligation of his warranty. On the question of the damages resulting to the appellee because of the breach of the warranty, there is evidence in the case from which the jury might properly concluded that the heating aparatus was practically without value for the heating purpose for which it was installed; but that if removed, it had a value of about $300. It is a reasonable inference from this evidence that appellee was damaged to an amount which exceeded what was claimed in his affidavit of merits; we conclude therefore, that the verdict of the jury was supported by the evidence.

The errors assigned by appellant concerning the refusal and modifications of instructions are not properly before us for consideration because the appellant has not set out all the instructions; and the record does not even show, at whose instance the different instructions were given or refused. It is a well settled rule, that where only the instructions complained of, are set out in the abstract, the court will not consider errors assigned concerning them, because it must be presumed, that the errors if there are any, are cured in the other instructions, which were not set out. The city of Danville v Schultz 99 Ill. App. 288; Terre Haute & I. R. Co. v Williams, 69 Ill. App. 392; Hellmuth v Katschke, 35 Ill. App. 21; McGillis v Gaile, 33 Ill. App 316; St. Louis A. & T. R. Co. v Barrett 52 Ill. App. 510; Belleville Pump Works v Bender 69 Ill. App. 189; Pratt & Co. v Paris Gaslight & Coke Co. 155 Ill. 531; City of Roodhouse v Christian 158 Ill. 137; Thompson v People 192 Ill. 79; People v Weil, 243 Ill. 314.

The modifications of instructions complained of however made no substantial change in the instructions, and apparently could not have had any effect upon the conclusions reached by the

the jury were warranted in believing the testimony of that witness; but even if we make no objection to the ruling, it would necessarily relieve the appellant from the obligation of his assignment. On the question of the damages resulting to the plaintiff from the breach of the warranty, there is evidence in the case from which the jury might properly conclude that the heating apparatus was practically without value [illegible] for which it was installed; but that is immaterial. The [illegible] question. It is a reasonable inference [illegible] police was damaged to a [illegible] in his affidavit of merits [illegible] lost on the jury [illegible].

The errors assigned by [illegible] and modifications of [illegible] or consideration because [illegible] abstractions; and the [illegible] the different instructions [illegible] settled rule, [illegible] set out in [illegible] signed concerning them, [illegible] errors in [illegible] which we [illegible]

[illegible] 302; Torre Radio [illegible] Hillmann v [illegible] 302; Dr. Louis [illegible] Vitis Tarp Corp. [illegible] Cooley & Cone Co. [illegible] 185 Ill. 137; Thompson [illegible] 243 Ill. 311.

The modification of [illegible] however made no substantial change in the instructions, and [illegible] could not have had any effect upon the conclusions reached by the

jury. The refused instruction which in effect directed a verdict unless the appellee had proved by a preponderance of the evidence that he had provided a sufficient draft for the use and operation of a No. 58 furnace was properly refused.

We find no reversible error in the matters presented for review, and the judgment is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6569

1350

211 I.A. 654

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6569

Thomas A. Farrell, appellee

vs Appeal from Knox.

Money Almgren and F. O. Munson

appellants.

Niehaus, J.

In this case the appellee, Thomas A. Farrell, sued the appellants Money Almgren and F. O. Munson in the circuit court of Knox County, to recover for commissions which he claimed were due him under a contract with appellants, by which the appellants agreed to pay the appellee, if he would find a purchaser for their farm of 153 acres, all the purchaser would give for the farm above $100 an acre; and it was claimed that the appellee found a purchaser, who was ready able and willing to buy the farm in question for $105 per acre. There was a trial by jury, and a verdict and judgment in favor of the appellee for $765 which was $5 per acre for 153 acres, from which judgment this appeal is prosecuted.

The proof shows that the appellee made a contract with the appellants by which he was to act for them, as their agent, to sell the land in question. The fact of agency is not disputed; nor is there any serious conflict in the evidence as to the amount of commissions which the appellee was entitled to receive from the appellants, in case he procured a purchaser who would buy the land from them, namely all that the purchaser would be willing to pay for the land over $100 per acre. It is also clear from the proof, that the appellee found a purchaser who wanted to purchase the land; and who was able ready and willing to do so; and in fact had made arrangements for the purchase of the land at $105 per acre. The appellee testified, that on Saturday evening October 6, 1917, he informed one of the appellants Money Almgren

Gen. No. 6589

Thomas A. Turrell, appellee

vs. Appeal from Knox.

Money Almgren and T. O. Munson

appellants.

Mielsue, J.

In this case the appellee, Thomas A. Turrell, sued the appellants Money Almgren and T. O. Munson in the circuit court of Knox County, to recover for services which he claimed were due him under a contract with appellants, by which the appellants agreed to pay the appellee, if he would find a purchaser for their farm of 160 acres, all he purchaser would give for the farm above $100 an acre; and if he [illegible] for the farm [illegible] purchaser, who was ready able and willing to buy the farm in question for $105 per acre. There [illegible] by jury, [illegible] and judgment in favor of the [illegible] for $105 [illegible] more for 160 acres, from which judgment [illegible] prosecuted.

The proof shows that the appellee met a purchaser in the appellants by which he [illegible] Thomas, [illegible] sell the land in question. [illegible] not [illegible] nor is there any serious conflict in [illegible] of conversations which the [illegible] appellants, in fact [illegible] land from [illegible] to pay for the land over [illegible] the proof, that the appellee found a purchaser [illegible] purchase the land; and he was able ready and willing [illegible] and in fact had a [illegible] $105 per acre. The [illegible] October 6, 1917, he informed one of the [illegible] Money Almgren

that he had secured a purchaser for the land. The next day after he had received the information testified to by the appellee, which was Sunday, the appellee Almgren entered into articles of agreement with Munson, the other appellant, for the purchase of Munson's interest in the farm in question; and thereupon when the appellee appeared upon the scene the next day with this purchaser, he was informed by Almgren, that he was too late; that Almgren had bought the place himself. And appellants claim, that it was a part of the agreement made with appellee concerning the sale of the farm, their right to sell and handle the farm themselves be reserved to them and in case the appellants sold the farm themselves, appellee was to have no commissions. The appellee denied, that the appellants reserved the right to sell or handle the matter of the sale themsleves; but assuming that the reservation claimed by the appellants, was actually a part of the terms of the contract, can the transfer of the undivided one half interest in the farm by one of the appellants to the other, be legally construed as a sale of the farm as contemplated by the alleged reservation? It is evident that the trial court construed the contract to mean that selling or handling the matter of the sale of the land themselves did not mean the selling of an interest in the land by one appellant to the other; that it had reference to the sale of the farm and not any interest in it; and to a purchaser who would purchase the entire farm and the interest of both of the appellants. We are of opinion that the trial court correctly construed the contract in question. The selling or handling of this farm must be construed to have reference to the same matter concerning which they employed the appellee as agent, which was to find some one who would purchase the farm from them. Moreover, after the transfer of the interest by Munson to Almgren who was bound by the contract

that he had secured a purchaser for the land. The next day after he had received the information testified to by the appellee, which was Sunday, the appellee Almgren entered into articles of agreement with Munson, the other appellant, for the purchase of Munson's interest in the farm in question; and thereupon when the appellee appeared upon the scene the next day with this purchaser, he was informed by Almgren, that he was too late; that Almgren had bought the place himself. And appellants claim, that it was a part of the agreement made with appellee concerning the sale of the farm, their right to sell and handle the farm themselves be reserved to them and in case the appellants sold the farm themselves, appellee was to have no commissions. The appellee denied, that the appellants reserved the right to sell or handle the matter of the sale themselves; but assuming that the reservation claimed by the appellants, was actually a part of the terms of the contract, can the transfer of the undivided one half interest in the farm by one of the appellants to the other, be legally construed as a sale of the farm as contemplated by the alleged reservation? It is evident that the trial court construed the contract to mean that selling or handling the matter of the sale of the land themselves did not mean the selling of an interest in the land by one appellant to the other; that it had reference to the sale of the farm and not any interest in it; and to a purchaser who would purchase the entire farm and the interest of both of the appellants. We are of opinion that the trial court correctly construed the contract in question. The selling or handling of this farm must be construed to have reference to the same matter concerning which they employed the appellee as agent, which was to find some one who would purchase the farm from them. Moreover, after the transfer of the interest by Munson to Almgren was found by the contract

made with appellee, as well as Munson, he was inxbetter position than before, to sell the farm to the purchaser found by appellee; and could ~~xxx~~ not by a refusal to sell deprive appellee of his right to the commission.

It is also urged by the appellants that the evidence does not sufficiently show that the purchaser who was ready, was also able to purchase the farm; and that in addition to the proof, that the purchaser had made arrangements with George A. Lawrence to borrow money to pay for the land, there should have been evidence offered to show the financial standing of George A. Lawrence, and his ability to furnish the money. We do not think that this proof was necessary; especially in view of the ~~xxx~~ testimony of the purchaser, that he had the money to pay for the place; which testimony was not contradicted, nor discredited in any way. Complaint is made concerning the giving of certain instructions for the appellee, and also of the refusal of certain instructions offered by the appellants. If the trial court was right in its construction of the contract under which the appellee claimed commission, in holding that the transfer of the interest of one appellant to the other in the land did not affect the appellee's right to the commission, then there was no error in the given instructions; and the instructions requested by the appellants were properly refused; the court's construction of the contract we hold was right. We find no error in the admission or rejection of evidence during the trial. The record does not disclose any error, for which the judgment should be reversed; it is therefore affirmed.

Judgment affirmed.

ade with appellee, as well as Munson, he was in better position
han before, to sell the farm to the purchaser found on account
nd could only not by a refusal to sell leaving appellee of his
ight to the commission.

It is also urged by the appellants that the evidence does not
ufficiently show that the purchaser, who was ready, was also able
o purchase the farm; and that in addition to the proof, that
he purchaser had made arrangements with George A. Lawrence to
orrow money to pay for the land, there should have been evidence
ffered to show the financial standing of George A. Lawrence,
nd his ability to furnish the money. We do not think that this
roof was necessary, especially in view of the first testimony of
he purchaser, that he had the money to pay for the farm, which
estimony was not contradicted, nor impeached in any way. Com-
laint is made concerning the giving of certain instructions
or the appellee, and also of the refusal of certain instructions
ffered by the appellants. If the trial court was right in its
onstruction of the contract under which the appellee claimed
commission, in holding that the transfer of the interest of one
ppellant to the other in the land did not affect the appellee's
ight to the commission, then there was no error in the giving
nstructions, and the instructions requested by the appellants
ere properly refused; the court's construction of the contract
as held was right. We find no error in the admission or rejec-
ion of evidence during the trial. The record does not disclose
ny error, for which the judgment should be reversed; it is
therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of April, in the year of our Lord one thousand nine hundred and eighteen, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. DUANE J. CARNES, Justice.
Hon. JOHN M. NIEHAUS, Justice.
CHRISTOPHER C. DUFFY, Clerk.
E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUL 25 1918 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6582. Agenda 29.

Modern Woodmen of America,
Appellee,
-vs-
Julia A. Binder,
Appellant.

Appeal from Circuit Court
Kane County.

Niehaus, J.

In this case the appellee, Modern Woodmen of America, filed a bill in equity in the circuit court of Kane county against Julia A. Binder, appellant, and her agents and attorneys, to enjoin the collection of a judgment obtained in the same court by the appellant against the appellee. The facts relied upon by the appellee as a basis for the relief sought are set up in the amended bill. The appellant filed a general demurrer to the amended bill, which was overruled by the court, and the appellant abided by her demurrer, and thereupon the court decreed the relief prayed for. The appellee is a fraternal beneficiary society organized under the laws of this state, and issues benefit certificates of life indemnity to its members. The salient features of its amended bill upon which it bases its prayer for relief are as follows:- That on or about Setpember 3,1888, a benefit certificate was issued to one George Binder, then of Earlville, Illinois, for the sum of $3000, payable at his death to his wife, Julia Binder; that in May 1914, said Julia Binder, who is the appellant, commenced suit against the appellee to recover the amount due under said benefit certificate, alleging the death of her husband, George Binder. The facts constituting her right to recover as stated in the declaration filed in that case were that she was the wife of George Binder, and that said George

en. No. 6382. Agenda 29.

odern Woodmen of America,
Appellee,

-vs-

Appeal from Circuit Court
Kane County.

ulia A. Binder,
Appellant.

ieborne, J.

In this case the appellee, Modern Woodmen of America, filed bill in equity in the circuit court of Kane county against ulia A. Binder, appellant, and her agents and attorneys, to njoin the collection of a judgment obtained in the same court y the appellant against the appellee. The facts relied pon by the appellee as a basis for the relief sought are set up n the amended bill. The appellant filed a general demurrer to he amended bill, which was overruled by the court, and the ap- ellant abided by her demurrer, and thereupon the court decreed he relief prayed for. The appellee is a fraternal beneficiary society organized under the laws of this state, and issues benefit artificates of life indemnity to its members. The material eatures of its amended bill upon which it based its prayer for elief are as follows:- That on or about September 1, 1888, a enefit certificate was issued to one George Binder, then of arlville, Illinois, for the sum of $2000, payable to the health o his wife, Julia Binder; that in May 1894, said Julia Binder, ho is the appellant, commenced suit against the appellee to re- over the amount due under said benefit certificate, alleging the eath of her husband, George Binder. The suit contesting her ight to recover was related in the declaration filed in that case ere that she was the wife of George Binder, and that [illegible]

Binder had been absent and not heard from for more than seven years; and that she has made diligent inquiry concerning him among his relatives, friends and neighbors, and from all other people who might be presumed to know or hear from him; and that from all such search and inquiry she was unable to find him, or learn, that he was alive at any time during said period of seven years, and that from such facts he was then presumed to be dead; that she had presented proofs of his death to the appellee, and that the appellee was indebted to her in the sum of $5000, the amount of said benefit certificate, and interest. That this appellant's action at law which was based upon the presumptive death of George Binder, was tried in the circuit court of Kane county; and the court found that said George Binder was dead, and that the appellant as his widow was entitled to recover the amount of said benefit certificate and interest, namely, $3462.50, and on January 13, 1917, rendered a judgment on this finding against the appellee. It is also alleged in the amended bill that during the month of Setpember, 1913, when the appellant first filed her claim under the benefit certificate, she filed with said claim a statement that said George Binder had disappeared; that he had been unheard from for upwards of seven years; that he was last heard from at Argentine, Kansas, on Christmas Day, 1905, and that he was presumed to be dead from the fact of his unexplained absence; that the appellee thereupon instituted an investigation to ascertain the truth of the claim made by the appellant and to find out whether said George Binder was living, and that an agent of appellee in October 1913, called upon appellant at her residence in Chicago and made inquiries of her as to what she knew concerning her husband. That in the conversation had at that time the appellant informed appellee's agent

[illegible]
[illegible]
[illegible]

that her husband had been a carpenter; that he had left Earlville in January, 1903; that she heard from him within two or three months thereafter from Mountain Park, Oklahoma; that thereafter he had been heard from in Newton, Kansas, and that after that she had received word from him Christmas Day 1905; that at that time he was in Argentine, Kansas, working as a carpenter for the Sante Fe Railroad, in the building of a station, but had not been heard from since. That after obtaining the information mentioned from the appellant, the appellee ascertained the name and address of the superintendent of the division of the Sante Fe Railroad, which includes the town of Argentine, Kansas, and then wrote to the superintendent to ascertain the name of the contractor who erected the station ar Argentine, and inquired of the superintendent for the names of the person who had hired said George Binder, and for the names of the persons who had worked with said George Binder at Argentine, stating also that it was claimed that said George Binder had been gone for seven years and that a presumption of his death arose from such absence; that on November 4, 1913, appellee received a reply to its letter from the chief engineer of the Sante Fe Railroad stating that said station at Argentine was built in 1906 and had not been started in 1905; that thereupon the appellee wrote to said chief engineer asking for the name of the contractor who built said Argentine station in 1906, and asked if any work had been done on said Sante Fe Railroad at Argentine in the year 1905; that it also wrote to the appellant stating the information it has received from the chief engineer of the Sante Fe Railroad, but received no reply from appellant; but on November 11, 1913, received a letter from the chief engineer of the Sante Fe Railroad giving the name and address of the person who built the Argentine

that her husband had been a carpenter; that [illegible] civilio
in January, 1903; that she heard from him within two or three months
thereafter from Fountain Park, Oklahoma; that thereafter he had
been heard from in Newton, Kansas, and that after that she h[illegible]
received word from him Christmas Day 1906; that at that time he
was in Argentine, Kansas, working as a carpenter for the Santa Fe
Railroad, in the building of a station, but had not been heard from
since. That after obtaining the information mentioned from
the applicant, the applicant ascertained the name and address of the
superintendent of the division of the Santa Fe Railroad, which
includes the town of Argentine, Kansas, and then wrote to the
superintendent to ascertain the name of the contractor who erected
the station at Argentine, and inquired of the superintendent for the
name of the person who had hired said George Hinson, and for the
names of the persons who had worked with said George Hinson at
Argentine, stating also that it was claimed that [illegible] had been gone for seven years and that a presumption of his death
rose from such absence; that on November [illegible], 1910, [illegible]
received a reply to its letter from the chief engineer of the Santa
Fe Railroad stating that said [illegible] had been employed in
1906 and had not been started in 1906; that [illegible]
wrote to said chief engineer asking for the [illegible] with other
who built said Argentine station in 1906, [illegible]
had been done on said Santa Fe railroad [illegible]
1906; that it also wrote to the superintendent [illegible]
it has received from the chief engineer of the [illegible]
but received no reply from [illegible]; and on [illegible], 1910,
received a letter from the chief engineer of the [illegible]
giving the name and address of the person who built the Argentine

station; and thereupon it wrote to the person named stating that it desired to locate George Binder; that it was claimed that he had been working on said station; that it would like to learn whether said George Binder worked at Argentine, and to get the names and addresses of other men employed at said time and place, and to receive any information concerning said George Binder; and also, that it was claimed that said George Binder had not been heard from for seven years, upon the basis of which a claim had been made against the appellee, for the proceeds of a policy issued by the appellee to said George Binder; that the appellee in writing said last mentioned letter enclosed a self-addressed stamped envelope for reply, but never received any reply; that appellee never received any other information concerning the location of said George Binder, nor any clue that would enable it to make any further investigation concerning appellant's claim, or to indicate the fact that said Georhe Binder might be living, and never received any further or additional information from appellant that would have enabled appellee to carry on any further investigation prior to the entry of the judgment in question. But after the said judgment had been obtained, namely, on or about February 1,1917, the appellee accidentally obtained information to the effect that said George Binder was then still alive in the State of Oklahoma, and had been there recently seen; that this information was contained in a newspaper article published in Earlville, Illinois, which recited the fact that one W.B.Robinson, of Earlville, had recently seen said George Binder in the State of Oklahoma; that the appellee thereupon immediately tried to call said W.B. Robinson over the long distance telephone, but was informed that said W.B. Robinson had left Earlville, and had probably gone to the State of

station; and thereupon it [illegible] to the [illegible] stating that it desired to look to George Hinder; that it had [illegible] that he had been working on said station; that [illegible] to learn whether said George Hinder [illegible] the names and addresses of other men [illegible] and to receive any information concerning [illegible]; also, that it was claimed [illegible] heard from for seven years, upon the [illegible] had been made against the [illegible] issued by the [illegible] to [illegible]; that the [illegible] in writing said last mentioned letter enclosed a [illegible] stamped envelope for reply, but never received any [illegible]; that appellee never received any other information concerning the location of said George Hinder, nor any other [illegible] make any further investigation [illegible], or to indicate the fact that [illegible] never received any [illegible] that would have enabled [illegible] tion prior to the entry of [illegible] said judgment has been [illegible] the appellee [illegible] said George Hinder was [illegible] and had been there recently; [illegible] tained in a newspaper [illegible] which noticed the fact [illegible] recently seen said George [illegible] the appellee thereupon [illegible] over the long distance telephone, [illegible] Robinson had left Louisville, [illegible]

Georgia; that thereafteron February 12, 1917, appellee caused an investigation to be made at Earlville concerning the report of said W.B.Robinson that said George Binder was still alive, and from said investigation appellee learned that said W.B.Robinson had informed several persons that he had seen George Binder in Oklahoma in the month of December, 1916; that appellee endeavored to communicate with said W. B.Robinson but was unable to do so until April 12, 1917, at which time said Robinson was again in Earlville, and appellee interviewed him at that time, and thereupon learned definitely for the first time that said George Binder was living and in robust health and had been seen and talked with by the said W.B.Robinson in the State of Oklahoma in December 1916. It is also alleged in the amended bill that said George Binder obtained a decree of divorce in an action against said Julia Binder in the district of Okmulgee County, Oklahoma, January 9, 1915, and that said decree was entered by Hon.Wade S.Stanfield, Judge of said district court in and for said Okmulgee County, Oklahoma, and that said cause in which said decree was entered was commenced on September 23, 1914, and was known as Calendar Number 3421. It is also alleged in said amended bill that the appellant first learned the location and address of said George Binder from the testimony of W.B.Robinson given in open court on the date when the original application in this cause was filed, and that appellee was unable to ascertain the location of said George Binder prior to that time and that it immediately instituted an investigation in the city of Okmulgee, Oklahoma; that appellee at that time had no knowledge, information or belief that said George Binder had obtained a divorce from Julia Binder, but surmised that a divorce might possibly have been obtained by said George Binder, and therefore investigated the court records at Okmulgee to ascertain the

georgia; that thereafter on February [illegible], 1917, [illegible]
investigation to be made at Darlville concerning the report of [illegible]
W.B.Robinson that said [illegible] was still living, [illegible]
investigation appellee learned that [illegible] Robinson had [illegible]
several persons that he had been seen over in Oklahoma in the
month of December, 1916; that appellee endeavored to [illegible]
with said W.B.Robinson but was unable to do so until April 8,
1917, at which time said Robinson was in Darlville, and
appellee interviewed him at that time, and the person named
finitely for the first time that said [illegible] was living
and in robust health and had been seen and talked with by the
W.B.Robinson in the state of Oklahoma in [illegible] 1916. It is also
alleged in the amended bill that a [illegible] decree
decree of divorce in an action pending [illegible] in the
district of Okmulgee County, Oklahoma, [illegible] the
said decree was entered by [illegible] the
district court in and for said Okmulgee County, Oklahoma, [illegible]
said cause in which said [illegible]
September 22, 1916, and was [illegible]
is also alleged in said amended bill that [illegible]
learned the location of said [illegible]
testimony of W.B.Robinson [illegible]
original application in the [illegible]
unable to ascertain the location [illegible]
time and that it is reasonably [illegible]
ity of Okmulgee, Oklahoma; [illegible]
knowledge information or belief [illegible]
obtained a divorce from said [illegible]
might possibly have been obtained by [illegible]
fore investigated the court records [illegible]

fact; that appellee first learned on April 30, 1917, concerning said action of said George Binder for a divorce, and the result thereof; that said George Binder is now living and a resident of the city of Okmulgee, Oklahoma. It is clear from the averments of the amended bill, which must be taken as true, that George Binder was alive at the time of the rendition of the judgment complained of, and that the judgment was the result of accident and mistake, and that the right of third persons have not in any way intervened. The right to relief in a court of equity against a judgment which is the result of accident or mistake is fully established. Miller v.Barto, 247 Ill. 104; Hilt v.Heimberger, 235 Ill.235; Holmes v.Stateler, 57 Ill. 209. Courts of Equity, howevern will not grant the relief prayed for if the complaining party had aopportunity to make his defense ar law to the judgment and had neglected to do so. Martin V.McCall, 247 Ill. 484. And it is contended by the appellant that the appellee was negligent in not sooner ascertaining the facts alleged in the amended bill; and that by the exercise of proper diligence it could have ascertained that George Binder was alive before the trial of the law case, and that therefore it has no standing in a court of equity, We cannot agree with the appellant in this contention. Taking the avements of the amended bill as true it is not apparent how the appellee, from the information which it was able to gather concerning George Binder, could have expected to locate him as living in Okmulgee, Oklahoma, by any reasonable diligence or search. It must be remembered that appellant was George Binder 's wife, and therefore most intimately related to him. and

ect; that appellee first learned on April 30, 1917, concerning
said action of said George Linder for a divorce, and the result
thereof; that said George Linder is now living, and resides
at the city of Okmulgee, Oklahoma. It is clear from the evidence
of the amended bill, which must be taken as true, that George
Linder was alive at the time of the rendition of the judgment
complained of, and that the judgment was the result of accident
and mistake, and that the right of third persons have not in any
way intervened. The right to relief in a court of equity against
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established. Miller v. Berto, 247 Ill. 103; Hill v. Hallenberg,
35 Ill.239; Holmes v. Stephler, 97 Ill. 229. Courts of equity,
however, will not grant the relief prayed for if the complaining
party had opportunity to make his defense or have the judgment
and had neglected to do so. Martin v. [illegible], 2e Ill. [illegible].
and it is contended by the [illegible] the judgment
n not sooner asserting the [illegible] bill;
nd that by the exercise of proper diligence [illegible]
ained that George Linder was alive [illegible]
se, and that therefore it was [illegible]
e cannot agree with the [illegible]
e averments of the amended bill [illegible]
e appellee, from the inform[illegible]
concerning George Linder, [illegible]
iving in Okmulgee, Oklahoma, by [illegible]
earch. It must be [illegible]
ife, and therefore not [illegible]

had lived with him up to the time of his departure, and would naturally therefore have more knowledge concerning him, and his whereabouts, as well as concerning his family connections, and friends and acquaintances and other intimates who might have knowledge concerning his whereabouts. She was in the best position to get results from any search or inquiry that might be made concerning him, and hersuit for recovery upon the benefit certificate in question was based upon the fact alleged by her that she made diligent search and inquiry to ascertain whether her husband was still living, and that such search and inquiry were fruitless; and that therefore her husband must be presumed to be dead. The appellant is hardly in position to say that the appellee could have ascertained the fact that George Binder was still living at the time of the trial of the suit at law, when the wife acting under conditions more favorable than the appellee could have acted under, was unable to ascertain the fact. It could not be expected of the appellee that it re-make the investigations and search made by appellant; but he had a right to accept these, and appellant is not in position to assert that they were not made with diligence or that anything was neglected in trying to find out whether her husband was still living. But x it appears that the appellee nevertheless did make further investigation which, while it did not bring the information which it sought for, nevertheless relieves the appellee of the charges made by appellant of neglecting to ascertain its defense in the suit at law. The discovery that George Binder was living and a resident of Oklahoma according to the allegations of the amended bill was purely accidental and came to appellee after the judgment had been obtained, and it is not apparent that any amount of diligence or search would have gained this information

had lived with him up to the time of his departure, we would
naturally therefore have more knowledge concerning him, and his
whereabouts, as well as concerning his family connections, and
friends and acquaintances, and other intimates, than we might have
knowledge concerning his whereabouts. He was in the best position
to get results from any search or inquiry that might be made
concerning him, and in the recovery upon the security certifi-
cate in question we laid upon the fact diligently to the
diligent search and inquiry made in accordance with the instructions
still living, and a search and inquiry were truly made;
that therefore [illegible] to be removed and done. The ap-
pellant is barred [illegible] to say that [illegible]
ascertained the fact by [illegible] in or [illegible]
of the trial of the [illegible], when the [illegible] conditions
more favorable than [illegible] to ascertain the [illegible]
that it remained [illegible]
but he had right to keep them [illegible]
position to assert [illegible] were not [illegible]
anything was required [illegible] to [illegible]
was still living [illegible]
did make further [illegible]
formation which [illegible]
of the charges [illegible]
defense in the [illegible]
living and [illegible] according to the [illegible]
the amended bill [illegible]
the judgment [illegible]
amount of diligence [illegible]

for the appellee before the time of the entry of the judgment. In Holmes v.Stateler, supra, the court expressly holds that where a party seeking after making every effort in his power to discover evidence and fails, upon the evidence being afterwards discovered courts of equity will treat this as an accident. For the reasons stated we are of opinion that the averments in the amended bill are sufficient to entitle the appellee to the relief prayed for and that the demurrer was properly overruled. The decree is therefore affirmed.

Decree affirmed.

for the appellee before the trial court and entry of the judgment. In Holmes v. Stanfield, supra, this court expressly holds that where a party seeking aid in making out a defense in his power to discover evidence and facts, upon the evidence being afterwards discovered courts of equity will treat him as an honest. For the reasons stated we are of opinion that the averments in the amended bill are sufficient to entitle appellee to the relief prayed for and that the demurrer was improperly overruled. The decree is therefore affirmed.

Decree affirmed.

TATE OF ILLINOIS, } SS.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in nd for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO IEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in he above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

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